



Province of British Columbia

ACCESS TO JUSTICE



The Report of The Justice Reform Committee - 1988

BC
A8
S.A32
1988
C-4

Canadian Cataloguing in Publication Data

British Columbia. Justice Reform Committee.
Access to justice

Chairman: E.N. Hughes.

Bibliography: p.

ISBN 0-7726-0890-3

1. Court administration - British Columbia. 2.
Justice, Administration of - British Columbia. I.
Hughes, E. N. II. British Columbia. Ministry of
Attorney General. III. Title.

KEB533.A742A15 1988 347.711013 C89-092016-8



ACCESS TO JUSTICE

Report of the Justice Reform Committee

Presented to the Attorney General
of
British Columbia

November, 1988



Members of the Justice Reform Committee

HON. E. N. (TED) HUGHES, Q.C.
(CHAIRMAN)

WILLIAM S. BERARDINO, Q.C.

SUSAN M. BRICE

W. STEWART FLEMING

BARBARA J. NELSON, Q.C.

W. GLEN PARRETT, Q.C.

RICHARD C. C. PECK, Q.C.

DEPUTY ATTORNEY GENERAL

BARRISTER

MAYOR, MUNICIPALITY OF OAK BAY

ADMINISTRATOR, CITY OF KELOWNA

BARRISTER

BARRISTER

BARRISTER

THE HON. MR. JUSTICE WILFRED J. WALLACE
BRITISH COLUMBIA COURT OF APPEAL
(SPECIAL ADVISOR TO THE COMMITTEE)

KATHLEEN KEATING, LL.B.
CHIEF WRITER &
DIRECTOR OF RESEARCH



From left Kathleen Keating, Richard Peck, Susan Brice, Stewart Fleming, Hon. E. N. (Ted) Hughes, Glen Parrett, Barbara Nelson, William Berardino, Hon. Wilfred Wallace



TABLE OF CONTENTS

Terms of Reference	iv
Letter of Transmittal	vi
Introduction	1
Plain Language	6
Access to Legal Information	13
Education	17
Alcohol and Drug Abuse	20
The Supreme and County Courts	24
Family Law	40
Criminal Law and Procedure	72
Pre-Trial Case Management	102
Selected Topics in Case Management	121
Economical Litigation Program	141
Masters and Registrars	146
Appeals	150
Lawyers' Fees	153
Costs	160
Court Filing Fees	168
Small Claims Court	170
Enforcement of Municipal By-Laws	177
Alternate Dispute Resolution	180
Justice Requirements of Particular Groups	196
Technology & the Justice System	208
Statutory Amendments	222
Conclusion	228
Summary of Recommendations	231
Submissions	256
Letters	260
Bibliography	265



TERMS OF REFERENCE

January 8, 1988

The goal of the Justice Reform Committee is to cause the justice system of the Province of British Columbia to be accessible, understandable, relevant and efficient to all those it seeks to serve.

Towards that end the Committee will investigate the attitudes of citizens towards the justice system and address any dissatisfactions which may be felt on account of the system being too complicated, too costly, or too slow.

In particular, the Justice Reform Committee will address itself to these areas:

CIVIL LAW: The Committee's aim is to make recommendations that will expedite the civil trial list in the Lower Mainland and resolve related problems throughout the province by bringing reforms to the trial and chamber process. This will include:

Reviewing, and where warranted, changing, the rules of procedure in all areas, including such matters as pre-trial applications, examinations for discovery, agreed statements of fact, setting of trial dates, use of special referees and assessors, settlement conferences, and the imposition of sanctions for failure to conform to procedural rules;

Reviewing, and where warranted, changing, the rules of evidence in all areas, including matters such as alternatives to oral evidence by extending the use of affidavits, interrogatories and video recordings; and

Proposing solutions to problems which are unique to multiple-party law suits including those posed by the issue of joint and several liability and by the *Contributory Negligence Act*,

all with a view to shortening, simplifying and reducing the cost of the trial process.



CRIMINAL LAW: The Committee's aim is to make recommendations that will streamline criminal trials and thereby eliminate unnecessary delays and undue technical arguments. This will include:

Fostering the use of early and improved pre-trial disclosure procedures;

Reforming the rules of evidence to allow simplified methods of proof of facts not in issue, tendering of exhibits, making of admissions and the expanded use of certificate evidence and of pre-trial procedures;

Assessing the role of the preliminary hearing and ensuring that those features which cause it to be prolonged and costly are eliminated; and

Simplifying the classification of offences, procedures, and levels of criminal courts now found in the Criminal Code of Canada.

COURTS - THEIR JURISDICTION AND STRUCTURE: The Committee intends to make recommendations that will remove overlaps in the jurisdictions of the various levels of courts, both trial and appellate, and to identify an appropriate court structure for the province, particularly with respect to:

Family law and the concept of a Unified Family Court;

The function of the County Court in relation to the Supreme Court;

Provincial Court procedures with respect to the prosecution of municipal by-law infractions and to small claims matters; and

Delivery of court services to meet the needs of residents outside the major population centres of the province.

ALTERNATE DISPUTE RESOLUTION: The Committee's goal is to make recommendations that will extend the use and utility of alternate dispute resolution procedures including arbitration and mediation, both within the context of the litigation process and outside of and separate from it.



Chairman
E. N. (Ted) Hughes, Q.C.
Telephone 387-5211

Members
William S. Berardino, Q.C.
Susan M. Brice
W. Stewart Fleming
Barbara J. Nelson, Q.C.
W. Glen Parrett, Q.C.
Richard C. C. Peck, Q.C.

Advisor to the Committee
Hon. Wilfred J. Wallace

Executive Secretary
Joanne Palmer
Telephone 387-1578

November 28, 1988

The Honourable Bud Smith, Q.C.
Attorney General
Province of British Columbia
Parliament Buildings
Victoria, British Columbia
V8V 1X4

Dear Mr. Smith

It is exactly one year ago that the then Attorney General of British Columbia announced the appointment of the Justice Reform Committee. We are pleased to submit to you the unanimous report of the Committee.

The first two months of our assignment were taken up with organizational matters. Then, from February to June the Committee travelled to all parts of the Province to hear from the public. The Committee heard from judges and lawyers and other professionals in the justice field, from people who have been personally involved in cases before the courts of this Province, and from groups and individuals with advice to offer based on experience gained as volunteers in the justice system. Everyone who asked to be heard was heard. In all, they numbered about 175. Another 200 or so wrote letters.

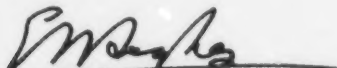
We were impressed by the quantity and the quality of the submissions made to us and we learned a great deal from them.

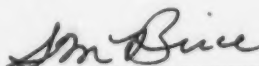
The months of July to November have been spent considering all of the presentations made to us and studying the literature on the many aspects of justice reform. There have been many, many meetings and long debates to reach the conclusions which are contained in this report.

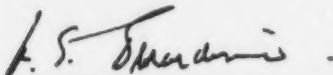
The wisdom of the decision to establish this Committee became very clear to us as we listened to the

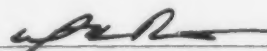
concerns and frustrations felt by many as they came into contact with the justice system. We also became aware of the many qualities that are much appreciated and must be preserved. We have considered it our challenge to present a report that effectively answers the concerns that we heard and builds on the strengths of our system of justice. We hope our report will chart the course for reform of that system so that it may best serve the people of this Province throughout the remainder of this century.

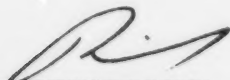
We have been honoured and proud to serve our Province in this very meaningful undertaking. We sincerely believe that adoption of this report and its recommendations by Government will put British Columbia in the forefront of providing justice services to the public in the most expedient and economical manner possible while preserving the highest standards of justice.

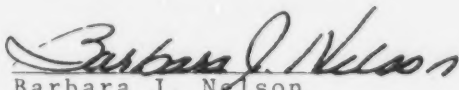

E.N. (Ted) Hughes, Chairman

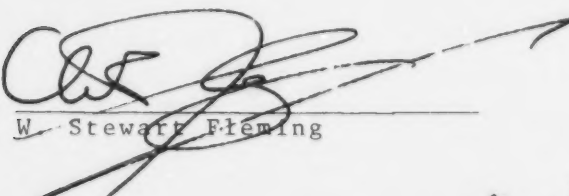

Susan M. Brice


William S. Berardino


W. Glen Parrett


Richard C.C. Peck


Barbara J. Nelson


W. Stewart Fleming


The Honourable Wilfred J. Wallace
Special Advisor to the Committee



INTRODUCTION

The Justice Reform Committee began its work one year ago with a mandate that extended into every corner of the justice system. Its Terms of Reference brought to the foreground the challenges facing British Columbia's justice system.

At the outset the Committee saw its task as a list of problems looking for solutions, but as the work proceeded another approach began to take shape. From a focus on isolated problems, the Committee turned to a process of formulating a set of goals for the justice system of British Columbia and then looking for the means of attaining those goals.

These are the goals that the Committee's recommendations are aimed at achieving:

- The basic values underlying our justice system must be preserved and its historical roots respected.
- There must be access to the justice system, at an affordable cost.
- There should be appropriate alternative methods for resolving those disputes that are not well suited to resolution in the courtroom and for those people who prefer an alternative.
- Citizens must be given the information they need in a meaningful form, so that they can gain access to the justice system.
- There should be an appropriate level of predictability in the justice system, in respect of cost, time frames, and outcome.
- Information gathering and analysis of its own processes should be an integral function of the justice system and the basis on which future direction is charted.
- Lawyers and judges share a mutual responsibility for the expeditious processing of litigation.



The Committee travelled to every county in the Province. In hotel meeting rooms, courthouses and municipal halls, they heard from lawyers and litigants, Bar Associations and volunteer groups, judges and local politicians. Some came forward spontaneously and told stories of personal experiences. Other submissions were the result of many hours of careful research by individuals or committees. Some recited lists of grievances; others gave thoughtful proposals for reform. In all, about 175 individuals and groups appeared before the Justice Reform Committee and more than 200 others wrote letters. All were useful in helping the Committee assess public attitudes and formulate its proposals.

The Committee also benefited from the diversity of experience of its members. The chairman is a former superior court judge with many years of experience on the Bench. Five of the Committee members are barristers practising in all of the courts of the Province, in both criminal and civil cases. The remaining two members are lay people with their own perspectives as users of the justice system. One is a mayor of a municipality, chairman of a police board and chairman of the Capital Regional District. The other has long experience as a civic administrator. Finally, the Committee had the benefit of the advice of a member of the Province's highest court, the British Columbia Court of Appeal. His extensive experience as a trial lawyer, then a trial judge and now an appellate judge has been invaluable.

In addition to its public hearings, the Committee searched the relevant literature and commissioned studies on selected topics. Experiences with judicial reform in the United States, England, Australia and elsewhere in Canada all were examined through the literature and through personal contact and much was learned in that process.

One of the questions the Committee faced from the beginning was: what structure will best carry our court system into the next century? Yet as the Committee debated the question and listened to views on all sides, it became clear that service to the people of this Province and not structure was the real challenge, and that is the direction from which the Committee ultimately approached the question.

From the beginning, the Committee heard stories from people who had become involved in lawsuits that were so lengthy and complicated



that they could no longer afford even to win. They felt helplessly entangled in a series of procedures which they did not understand, which they could not control, and which seemed to bring them no closer to a resolution of the case.

Building on the very substantial contributions of the Supreme Court Judges and the Judges of the County and Provincial Courts, and members of the Bar, the Committee has proposed a set of recommendations for procedural changes. They are based on the principle of tailoring procedures to fit the case.

At the same time, the Committee has come to the firm belief that it is people and not procedures that drive the system. Without a whole-hearted commitment by the Bench and the Bar to reduce delay and cost in the litigation process all the rules in the world cannot succeed. The American Bar Association's Action Commission to Reduce Court Costs and Delay says in its report:¹

What lawyers and judges want, will tolerate or resist in the litigation process can subtly change the contours of every procedural innovation introduced and can effectively predetermine their success or failure. Lasting reforms require bar and bench commitment not only to the theoretical goals of reducing delay and cost to litigants, but also to the inconveniences or disruptions that reforms may entail for their customary way of doing business.

The Committee is optimistic that there will be that commitment. Delay and excess cost affect not only clients, but the professionals who work in the system as well.

The depth of dedication in the legal community to improvement of the justice system is evidenced by the quality of the submissions presented to the Committee by the Bench and the Bar. In spite of the fact that the Judges of the Supreme Court are working to more than full capacity, they met in committees over the course of many months to produce a very substantial and helpful brief for the Committee. Large numbers of the County Court and Provincial Court Benches took the time to meet with the Committee and present their written briefs. The Canadian Bar Association made a major project of the preparation of their three briefs on criminal, civil and family law. There were

1 Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* (Chicago: American Bar Association, 1984).



many other examples of impressive efforts by groups and individuals. The Committee trusts that this wellspring of dedication to the justice system can be tapped in the interests of implementing its proposals for reform.

A dominant theme that emerged from the submissions and letters from lay people was their desire to understand the justice system and its language. If they must sign a form or swear an affidavit, they want to understand what it says. If they sit in a courtroom they want to understand generally what is going on. If they are subject to a set of rules they need to understand what the rules require. The language of the justice system should not be a barrier.

With that and its goal of access to justice in mind, the Committee recommends a major plain language initiative to be spearheaded by government. This report represents an attempt at plain language discussion of the justice system. Those chapters that the Committee expects may be of interest to non-lawyers have been written with that audience in mind. Those chapters that deal with subjects less likely to be of interest outside the profession speak in a slightly different voice, though still aiming for plain meaning. That is one of the basic principles of plain language - it addresses its audience directly.

There are many recommendations contained in this report, some of more consequence than others. All have been developed as tools for the achievement of the goals described above.

During the course of the Committee's work, a new Chief Justice of the Supreme Court of British Columbia took office. At her swearing in ceremony, Chief Justice McLachlin had this to say:

(T)he people of this Province can only be well served if the institution of the trial courts runs smoothly, efficiently, and without undue delay and expense. To this end . . . the Justice Reform Committee, in recent months, has been travelling across this Province, receiving submissions on how our courts can be better adapted to meet the new demands which are being placed upon them. It is not often that we contemplate reform or revision of the court system. The problems are difficult and the answers will certainly not be easy either to resolve or to implement. Thus the days to come will be a time for the Bar and the Bench to work closely together as never before, to ensure that the right changes are made and that they function to the end of providing to the public the best possible trial system, which must always remain our ultimate goal.



Finally, the Committee believes that justice reform should be an ongoing activity. When it is taken up every ten or twenty years, much energy is consumed in solving problems. If justice reform becomes a continuous function of the system, it can be approached from a long-term perspective. Changes can be implemented, results monitored and then adjustments made. Otherwise, there is no one to look back and see whether the changes have had the desired result.

It has been said that law reform abides by the motto of Satchel Paige, the baseball player who used to advise: 'Never look back. They might be gaining on you.' Fine advice for aging ballplayers but poor practice for lawmakers.²

² M. Rosenberg, 'Devising Procedures that are Civil to Promote Justice that is Civilized' (1971) 69 Michigan Law Review 797.



PLAIN LANGUAGE

When a man gives you an orange, he simply says: "Have an orange." But when the transaction is entrusted to a lawyer, he adopts this form: "I hereby give and convey to you, all and singular, my estate and interest, right, title, claim and advantages of and in said orange, together with all its rind, juice, pulp and pips and all rights and advantages therein with full power to bite, suck and otherwise to eat the same or give the same away with or without the rind, skin, juice, pulp and pips, anything hereinbefore or hereinafter or in any other means of whatever nature or kind whatsoever to the contrary in any wise notwithstanding".¹

Summary of the Proposal

British Columbians are entitled to a justice system that they can understand.

People involved in litigation need to understand the documents that affect them, and especially those documents that they must sign or swear. They should be able to understand the words that are spoken to them in court, by lawyers and judges. And the laws that govern people's lives should be intelligible to them.

The justice system of this Province must commit itself to speaking in plain language.

Plain language is not 'simple-minded' or 'over-simplified'. It varies with its context and audience: it lets the message get through easily and immediately. But plain language concerns itself with more than just the choice of words. Its theme is communication and so it calls for better organization of material and the way in which it is presented.

¹ This was reprinted in the Canadian Bar Review at least 30 years ago, from an item in the Montreal Star.



Laws and legal documents and forms should not only be framed in words that can be easily understood. They also should present information in a sequence that helps readers absorb it and in a design that helps readers find their way through. Plain language documents have been tested in the courts for more than a decade and the language has never been found wanting.

Why Plain Language?

A person wrote to the committee: "USE CLEAR and SIMPLE LANGUAGE. That will make the justice system more relevant, more efficient and better understood."

An engineer wrote to say laws should be written in plain language because people now do not know their rights and obligations.

Workers in a legal aid office said they spend a great deal of their time trying to explain the meaning of the words spoken by judges and lawyers, and contained in legal documents.

A Women's Centre said people are intimidated by legal documents because they cannot understand them.

Someone who has twice been a defence witness found that lawyers 'talk their fancy legal lingo that very few people understand'.

Simple fairness dictates that it is unjust to require people to sign, or even swear to, documents that they cannot understand. Legalese presents major problems for lawyers and judges as well. Poorly drafted statutes, regulations, documents and even judgments have caused countless lawsuits, because they didn't simply say what they meant.

It is not difficult to pinpoint the barriers to understanding that are raised by legalese. Sentences, paragraphs and whole documents are unnecessarily lengthy. Synonyms are piled upon synonyms:

- *acknowledge and confess;*
- *give, devise and bequeath;*
- *cease and desist;*
- *fit and proper;*
- *in its place and stead; and*
- *goods and chattels.*

Archaic words and phrases are used mindlessly and often imprecisely: '*Now This Indenture Witnesseth*' and '*Know All Men by These Presents*' are baffling to most non-lawyers and words such as



aforesaid, hereinafter and *the same* are often uncertain and even misleading in their reference.

Foreign phrases are used in preference to English equivalents: *inter alia*; *de novo*; *ab initio*; *ejusdem generis*; *in re*.

There are many more defects of language that are highlighted by modern drafting manuals. But the organization of statutes and documents can be just as big a roadblock to understanding. Poor organization obscures underlying principles and defeats the reader.

Traditional legal drafting has meant that Members of the Legislature need explanatory notes to allow them to debate proposed legislation. Staff require complex policy and procedure manuals and interpretive bulletins to allow them to administer government programs. And the public needs information brochures to allow them to fill out forms and understand what is required of them.

The Plain Language Movement

The plain language movement is at least 20 years old and it is international in scope.

ENGLAND

In England, the Plain English Campaign is a grassroots effort championed by Lord Denning which has led to the reform of official documents as a declared government policy. Its purpose is that the public should understand its rights and duties and be able to avail itself of the benefits offered by government programs. Also, it is intended to save money. The most dramatic saving is the 13,000,000 pounds which is the estimated yearly savings on a series of Department of Health and Social Security forms. Cost of the redesign was 350,000 pounds.

UNITED STATES

American banks and insurance companies were early players in the plain language movement in the United States, producing consumer contracts that their customers could read. Several states have now passed Plain English laws which make these a requirement. In the private, governmental and university sectors there has been a great deal of interest in plain language, resulting in texts, newsletters, seminars and drafting manuals.



AUSTRALIA

Much of the work that is being done in this field is being done in Australia. The Law Reform Commission of Victoria produced a Report in 1987 which contains a comprehensive discussion of the principles of plain language, the need for it, and the difficulties in achieving it.

As an answer to those who say that technical material or complex statutes cannot be written in plain language, the Commission produced a new readable version of the *Companies (Acquisition of Shares) Code* - probably Victoria's most complex statute. Many court forms have been redesigned, as a result of the Law Reform Commission's work, at great savings to government and convenience to the public.

CANADA

There have been efforts in many quarters over the past few years. The Yukon Territory, for instance, has made Plain Language a priority in its legislation for more than three years.

Canadian Law Information Council's Plain Language Centre is the focus of these activities in Canada. It has taken on the role of co-ordinating body and information bank. Gail Dykstra, the Council's public education director, says that B.C. is already far ahead of any other province in terms of the public legal education materials being produced. The display stands with information pamphlets that are in British Columbia courthouses are unknown in most other provinces, for example.

One of the projects recently undertaken by the Council, in co-operation with the Canadian Bar Association, is the development of an innovative system for numbering court cases across Canada. It can be difficult to locate a particular case in the law reports, or even in the registry where it is filed, because of the way cases are now recorded according to the names of the parties. The order of the names can vary from one report to another. When a case goes to appeal the name of the case changes again.

Under the new system, a case would be assigned an identity number (actually composed of numbers and letters) which would contain all the information necessary to identify the case. That number will not change throughout the life of the case, making legal research easier for everyone. This project is typical of a new approach to presenting information in a logical manner.



Within the Ministry of the Attorney-General, Court Services, there is an active Methods, Procedures and Productivity Unit with a keen interest in plain language. Part of their mandate is forms management and design and their principal objective is productivity improvement. They have succeeded in reducing 2,500 forms to 500 within Court Services at a substantial savings in paper cost and valuable processing time.

The Director of Land Titles is developing a one-page mortgage document that will contain all the essential features of the agreement.

Legislative Counsel favour a plain language approach in the drafting of statutes and regulations and have made progress in that direction.

A plain language commitment by government and the justice system would build on these strengths.

Elements of the Proposal

RECOMMENDATION 1

The Attorney General should establish a Plain Language Committee to develop a strategy for implementation of plain language in the justice system.

This would be a senior level, policy-making body that could provide leadership to the Bar, the Judiciary and to the Government at large. It should be assisted by a working subcommittee.

The Plain Language Committee should include: the Deputy Attorney General; Chief Legislative Counsel; a senior Judge; a representative of the Legal Services Society; experts in the field of plain language; community representatives; and a representative of the Canadian Bar Association.

Its terms of reference should be to:

- identify a strategy for the implementation of plain language in legislation and legal documents;
- define the elements of a plain language drafting style for British Columbia;
- identify those drafting practices which are inconsistent with plain language and impede understanding;



- determine whether any changes to common law and rules of interpretation are required; and
- determine whether legislation should be introduced to require certain types of agreements and documents to be drafted in plain language.

A working subcommittee of the Plain Language Committee should be established. It would report regularly to the Plain Language Committee and would include representatives from: Legislative Counsel; B.C. Branch, Canadian Bar Association; Continuing Legal Education; the Ministry of the Attorney General (Policy Division; Legal Services Branch; Methods, Procedures and Productivity Unit; and Records Management Branch;) Law Faculties; and a plain language expert (private contractor).

The working subcommittee should have authority to:

- establish plain language guidelines for documents;
- review selected documents which effect a wide segment of the public for conformity with the guidelines;
- monitor the progress of plain language implementation in their ministries, other levels of government and the private sector;
- provide training to ministry staff who are responsible for document design and development.

Implementation

Although the mandate of the Plain Language Committee will include the setting of priorities and determining strategy, there are two areas of immediate concern that could well serve as the focus of the working group's efforts in the short term.

They are firstly, those documents to be used by people who are representing themselves in legal proceedings, both in Small Claims Court and in the proposed Economical Litigation Project in County Court; and secondly, those forms and documents used particularly by seniors.

Small Claims Court would be a good place for a plain language initiative to begin because in this court people are usually unrepresented and often inexperienced. Also, the process is fairly structured and consistent: to begin a Small Claims Court case a person must go to the Registry and fill out a form. At that point the new form and information sheet can easily be given out.



All forms in Small Claims court could be rewritten in plain language, tested, evaluated and then reissued within a two year period.

At the same time, there will be a need for a new set of forms for use in the proposed Economical Litigation Program in the County Court. Since this procedure is intended to allow people to represent themselves, the documents they are asked to use and the instructions they must follow should be clear and simple.

Another priority item might be those documents and forms that are sent to and used by the elderly. These would include Powers of Attorney and documents relating to Committeeship, as well form letters sent by the Public Trustee's office.

Once those projects are complete and lessons learned, subsequent projects could be accomplished in a shorter time.

Impact

Justice will be more relevant, efficient, accessible and less costly when this Province makes a commitment to the use of plain language in the courts and all areas of the legal system.

Use of language that people can understand will build a positive link between the justice system and the public.

It will save money and time both within the system and for its users. People will be able to fill out forms themselves. They will be able to read the laws and rules and regulations that affect them and to understand their rights and obligations. In appropriate cases they will be able to represent themselves before the courts. And when represented by legal counsel they will be able to understand the documents they sign and the process that they are paying for.

The justice system will truly belong to the people it aims to serve.



ACCESS TO LEGAL INFORMATION AND ADVICE

Some citizens of this Province have limited access to legal information and advice because:

- they live in remote areas or small communities;
- they are frail or physically disabled; or
- they have trouble with the English language.

There are many communities throughout the Province with no direct access to legal help. Even in Vancouver people have difficulty locating the information they need, a 1988 Legal Services Society study showed.¹

Those they approach for help - librarians, court registry staff, or other agencies - are often uncertain of what alternative sources of information are available. When inappropriate referrals are made, everyone's time is wasted and the person seeking information becomes disillusioned and frustrated.

Local libraries and community-based agencies in smaller centres often do not have the support they need to serve the information needs of their communities.

A senior citizens' group wrote to the Committee to describe the difficulties faced by seniors who are unable to take advantage even of services that may be close at hand. They asked for a free centralized information service and referral system that they could access from anywhere.

The Proposal

British Columbia is a leader in the provision of legal information to its citizens. What is lacking is a province-wide network that would allow anyone easy access to the most appropriate source for their information needs.

¹ R. Brail, "Unrepresented Litigants: How Are Their Information Needs Being Met?", unpublished study prepared for Legal Services Society, (1988).



A toll-free Legal Information and Referral Service, available by telephone anywhere in the Province could provide information and put callers in touch with other information sources in their communities. It could also be a provincial resource base and back-up service to local services in both the library and legal sectors.

EXISTING RESOURCES

Existing information services include:

- The Legal Services Society's Legal Resource Centre, with all of its legal information publications;
- lay legal collections in public libraries around the Province;
- library staff with basic training in handling requests for legal information;
- Lawyer Referral Service;
- Dial-A-Law (taped messages on legal topics, available by telephone, provided by the B.C. Branch of the Canadian Bar Association);
- Law Line (telephone information and referrals provided by Legal Services Society);
- Brochures and information sheets in most court houses and government agencies;
- The Law Centre in Victoria;
- Public Legal Education Society (Peoples' Law School) classes;
- Vancouver Community Legal Assistance Society; and
- Law Students Legal Advice Program.

Court Services Branch of the Ministry of the Attorney-General said in its submission to the Committee:

... the time may be right to introduce community information lines to field all general public enquiries and refer them to the appropriate branch or local office. . . . If we cannot reduce the scope and complexity of the justice system, we can at least make it more understandable and assist people in making their way around that system with greater ease.



The Lawyer Referral Service provides a listing of lawyers in a community who will give a half hour of their time at a nominal charge. The purpose is to allow access to legal advice for people who have very simple questions which can be answered in a half hour, or simply need to know whether they in fact need the services of a lawyer at all.

This referral service could be extended to the entire Province if lawyers would provide telephone interviews for people who are unable to attend at a lawyer's office, either for reasons of geography or physical disability.

The Legal Services Society operates Law Line from its Resource Centre in Vancouver, providing information and referrals to more than 18,000 callers yearly. Outside of Vancouver, the Society administers the Lawyer Referral program in the communities where it operates.

With additional staff and a toll-free line, the Legal Services Society could provide such a service. Alternatively, the Canadian Bar Association, British Columbia Branch might be an appropriate vehicle.

A Legal Information and Referral Service could:

- give callers legal information, when possible;
- inform callers about available written materials, and often send it to them;
- tell callers about information sources in their own communities;
- direct callers to a Legal Services office or another agency;
- refer to a local Lawyer Referral Service, if available; or
- provide a telephone interview with a lawyer.

It should not attempt to replace locally-based libraries and legal service agencies. These are the people with hands-on information and knowledge of local referral services and local needs. Rather, it would link these services with province-wide back-up and support. It would be based on a computerized directory of law-related services and an expanded lawyer referral listing.

RECOMMENDATION 2

A toll-free network to allow province-wide access to legal information and referrals should be established. The Canadian Bar Association, British Columbia Branch, or the Legal Services Society are suggested as possible operators of the system.



Impact

A Legal Information and Referral Service would promote one of the primary goals of the Justice Reform Committee by making the justice system more accessible and understandable to those it seeks to serve.

People who need information about the law and the justice system would know how to find it. One call would lead them to the appropriate agency, or library, or pamphlet or lawyer.

The service would eliminate the frustration experienced by those who now cannot find their way through the maze of the laws and procedures that make up our justice system. It would also save time for all those librarians, registry workers, and staff of various agencies who are constantly presented with questions they are unable to answer.

Start-up costs would likely be approximately \$65,000, including development of a computerized database. Operating costs might be about \$200,000 annually. The Law Foundation could be approached as a possible source of funding.



EDUCATION

Schools and the Justice System

The justice system belongs to the people and depends on the support of the public in order to fulfill its purpose. Only a well-informed public can provide the highest degree of support. If people are knowledgeable about the justice system they will understand its importance in society. If equipped with accurate information they will support genuine reform and not simply react to the myths and false impressions sometimes created by the mass media.

For these reasons, the Committee sees education of the public about the justice system as a very high priority.

WHAT IS NOW TAKING PLACE

The Ministry of Education's definition of 'an educated person' includes an understanding of basic legal institutions and processes, important laws, and a person's legal rights and obligations. Accordingly, the social studies curriculum includes issues of law and government at every level. The Ministry of Education, in co-operation with representatives of the Ministry of Attorney General, are currently revising the Law 12 curriculum. A new textbook will be available in April, 1990 and will be in classrooms in September that year.

Law-related education also forms part of the program for future teachers enrolled in the education faculties at the University of British Columbia and Simon Fraser University.

Part of the mandate of the Legal Services Society is to educate about the law and this is carried out through its Schools Program. Four part-time staff work with the Ministry of Education on revising the Law 12 curriculum and, when possible, influencing curriculum in social studies. They also work with the Ministry of Education to



improve the prescribed materials and produce supplementary materials. As well, they run conferences and workshops for teachers.

THE CHALLENGE

Ethnic diversity is a growing reality in our communities. In increasing numbers, our society includes those who have grown up with a justice system that is completely different from our own. Our legal institutions and principles of justice that have evolved since early English history are foreign to many students in British Columbia's schools.

Teachers face pressures from many groups to teach everything from traffic safety to AIDS prevention. In this climate many teachers are likely to resist requests to teach more law in general courses. Their job is made more difficult when resource materials are inadequate. The Law 12 text now in use is an Ontario text containing references not applicable in British Columbia and many schools are using outdated editions.

THE PROPOSAL

Teachers will be more likely to include the law and the justice system in the courses they teach if readily useable materials are provided to them. The supplementary materials provided by the Legal Services Society Schools Program, are good examples. Textbooks provided to schools should be up-to-date and relevant to British Columbia.

RECOMMENDATION 3

The Committee commends the Ministry of Education for its work in developing legal education in all grades. Further initiatives should be taken as needed to ensure that teachers have the information, textbooks and other resources they require to enable them to educate children about our legal institutions and justice system.



RECOMMENDATION 4

The Ministry of the Attorney General should make the provision of information to teachers, students and the public generally, a priority.

The Volunteer Sector

Education of children in schools is an essential ingredient in the development of a community which understands and supports its justice system, but the volunteer sector offers another opportunity.

In its hearings across the Province, the Justice Reform Committee heard from many representatives of volunteer groups who are involved in one way or another with the courts. These include Elizabeth Fry and John Howard Societies, Family Court Committees, Mental Health Associations and many others. Their close association with the justice system teaches them a great deal about its workings, its shortcomings and its strengths.

RECOMMENDATION 5

Government and other agencies should continue and enhance their financial and other support of the volunteer sector. More citizens could be involved in local activities which will increase their understanding of the justice system.



ALCOHOL AND DRUG ABUSE: INFORMATION AND EDUCATION

Impact of Drug and Alcohol Abuse

Alcohol and drug abuse play a major role in many of the cases that find their way into the justice system. Some examples are:

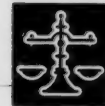
- Personal injury suits arising from motor vehicle accidents;
- Impaired driving offences;
- Drug trafficking offences;
- Assaults and property damage motivated by aggression and violence induced by drugs or alcohol;
- Thefts motivated by the need for money to buy expensive drugs;
- Assaults, homicides and attempted homicides which are part of the 'business' of the drug trade;
- Aggravation of family problems: marital discord, violence towards spouse and children, and juvenile delinquency.

In the first quarter of 1987, 39.2% of those arrested for serious crime in Vancouver admitted drug use. More than 70% of the men serving time in British Columbia prisons in 1987 were under the influence of alcohol at the time of the crime, or alcohol was a significant contributing factor.

The cost impact on our judicial system is stunning. We can no longer overlook the possibility of reducing demand for justice resources by addressing one of the fundamental causes - alcohol and drug abuse.

Lack of Data

Although people working within the justice system are aware of these facts, the Committee knows of no systematic effort to quantify



the impact. There is no central data bank which could reveal the extent and nature of the involvement of alcohol and drugs in the incidence of crime and civil actions. Without persuasive figures, the public minimizes the need for education and treatment of substance abuse. This is especially true in the case of alcohol.

RECOMMENDATION 6

A system for collecting information on the role that drugs and alcohol play in criminal, civil and family cases should be designed and implemented.

The data collection system should be professionally designed and should be integrated with other information gathering systems proposed elsewhere in this report.

Society's Attitude

Society has an ambiguous attitude toward alcoholism and drug addiction. Seen as both illness and crime, they evoke both sympathy and blame. When impairment and addiction are involved in the commission of a crime, the law treats them inconsistently. Sometimes the consequences will be more severe and sometimes less so, because of the part played by drugs or alcohol.

Some judges will urge counselling for people involved in family disputes who have substance abuse problems. Others consider such advice to be beyond their role as judge. Some judges will include involvement in a treatment program as part of a sentence. But many of these programs are designed for people who have the desire to change themselves. They can be ineffective for someone who refuses to admit that he or she has a problem and only attends the program to fulfill the terms of the sentence. There are not enough treatment facilities in any case.



Alberta's Approach to Impaired Drivers

THE IMPAIRED DRIVERS COURSE¹

The Alberta Impaired Drivers Course was introduced in 1970. Anyone convicted of an impaired driving offence must attend the one-day course before the province will reinstate the driver's licence.

The program's goals are:

- To provide information and assistance to participants who want to change or eliminate their present drinking/driving behaviour;
- To allow participants to evaluate their own drinking behaviour in the light of present knowledge of normal drinking behaviour; and
- To provide easy access to treatment for participants who see substance abuse as a personal problem.

THE IMPACT PROGRAM FOR REPEAT OFFENDERS²

In the early 1980s there was a growing number of offenders who were completing the Alberta Impaired Drivers Course and then re-offending. A new program, called IMPACT, was developed in response to that problem.

It is a residential program which runs from Friday evening to Sunday afternoon. It attempts to lead participants to look at the consequences of their mood-altering drug use and to investigate alternative behaviours. An assessment and set of recommendations are prepared for each participant. All those convicted of impaired driving more than once within the last five years must attend IMPACT before their licence will be reinstated.

Participants in both programs have reacted favourably to the course and they seem to have had some positive results. The Committee has also been told of a similar approach which has been adopted in Manitoba. Programs such as these should be available throughout British Columbia. They would be far more effective than those designed for volunteer participation.

1 *Field Testing a New Impaired Drivers Course 'Planning Ahead'* (Alberta Alcohol and Drug Abuse Commission, 1987).

2 *Impact: Program Development Studies* (Alberta Alcohol and Drug Abuse Commission, 1988).



RECOMMENDATION 7

Programs similar to the Alberta Impaired Drivers Course and IMPACT should be designed and implemented in British Columbia for those convicted of driving while impaired by drugs or alcohol. They should be reviewed regularly and revised as necessary.

RECOMMENDATION 8

With the impaired drivers' programs as a pilot project, similar strategies for other court-referred users should be developed.

Popular support for programs such as these and others will grow when people understand the extent of the problem and its true costs.



THE SUPREME AND COUNTY COURTS

Introduction to the Issues

GENERAL

The goal of the Justice Reform Committee is to cause the justice system of the Province to be more accessible, understandable, relevant and efficient to all those it seeks to serve.¹

In working toward this goal, the Committee has addressed itself to the task of identifying the most appropriate court structure for the Province, particularly with respect to the function of the County Court in relation to the Supreme Court, and delivery of court services to meet the needs of residents outside the major population centres.² Inevitably, the discussion in this area has focused on the idea of creating one superior trial Court for the Province by merging the Supreme and County Courts.

The purpose of this chapter is to focus the arguments for and against merger of the Courts and to present an alternative proposal which addresses the major concerns.

EARLY HISTORY OF THE COURTS

Justice, in this Province's early colonial days, was dispensed where needed by an assortment of Gold Commissioners, Indian Agents, Stipendiary Magistrates, and Government Agents. None of these were lawyers and Governor Douglas, of Vancouver Island, soon became

1 Justice Reform Committee, *Terms of Reference*

2 *Ibid.*



dissatisfied with their inexperience and with 'certain irregularities in their court'.³

In 1853 the Legislature acted on the Governor's wishes and created a high court of justice, to be presided over by legally-trained judges, to handle all matters worth 50 pounds or more. This new Court was initially called the Court of Common Pleas but the name was soon changed to the Supreme Court of Civil Justice of the Colony of Vancouver Island.

This was Western Canada's first 'English-style' superior court. Ironically, its first Chief Justice was a non-lawyer, Governor Douglas' brother-in-law, David Cameron. In 1865 he was succeeded by an English barrister. Meanwhile, Mathew Begbie, the first English-trained barrister to reside in British Columbia had begun to function as a superior Court Judge on the mainland.

With the union of the colonies in 1866, the two Courts were merged into the Supreme Court of British Columbia.⁴

One of the forerunners of our County Courts was established on Vancouver Island in 1856, based on the English legislation that is the cornerstone of the English County Court system.⁵ In those early years the colonial County Court was operated as a function of the Supreme Court, generally by the same people.

On the mainland, the *Small Debts Proclamation* of 1859 provided for the informal appointment of County Court Judges to hear cases worth up to 50 pounds. These appointments went to those already acting as Gold Commissioners, Stipendiary Magistrates, Indian Agents and Government Agents.⁶

After the union of the colonies, the *County Court Act* of 1867 meant that there was now an official County Court for the Province. Judges of this Court - who were still non-lawyers - had jurisdiction in matters up to \$500.

Over the next decade or so, there was growing dissatisfaction with a County Court presided over by men without legal training. By 1881 the work of the County Court had been entirely taken over by Supreme Court Judges, all of whom were by then lawyers.

3 D.R. Verchere, *A Progression of Judges* (Vancouver: University of British Columbia, 1988) at 12,15.

4 P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 257.

5 A. Watts, 'The County Court in British Columbia' (1968) 26 *Advocate* 245. The court was originally known as the Inferior Court of Civil Jurisdiction.

6 *Ibid.* at 245.



The *County Court Act* of 1883 established the County Courts much as we know them today. The first professional County Court Judge was appointed in 1884, to sit in Cariboo,⁷ followed by appointment of legally trained judges in the various counties.⁸ The *County Court Act* gave the Courts jurisdiction in all personal actions for amounts up to \$1,000 and certain equitable claims up to \$2,500.⁹

The Small Debts Court was created in 1886, with jurisdiction in actions for debt only and only in those cases worth up to \$100. It was staffed by lay Magistrates appointed by the Province.

The three levels of Courts that existed in 1885 exist today in much the same form and are staffed by judges appointed in much the same way. The types of action which may be brought in a County Court or in a Small Debts Court (now the Small Claims Division of the Provincial Court) have been broadened and the monetary limits of each of these Courts have been raised from time to time, but the Courts today are recognizably those that existed in 1885.¹⁰

JURISDICTION OF THE SUPREME COURT

A brief discussion of the jurisdictions of the Supreme and County Courts will highlight the reasons why merger seems to many to be a rational next step in the evolution of our court system.

The Supreme Court of British Columbia is what is known as a court of inherent jurisdiction. It is descended from the early English Royal Courts of Justice. The jurisdiction (authority) exercised by these courts came directly from the Crown and did not depend on statute law.

The Supreme Court has jurisdiction over all cases, both civil and criminal, arising in the Province, except for those matters that are specifically excluded by legislation.

7 Russell, *supra*, note 4, at 210.

8 Watts, *supra*, note 5 at 247.

9 J.W. Horn, *Jurisdiction of the Courts of British Columbia since Confederation*, memorandum written for the Justice Reform Committee (1988) at 2.

10 *Ibid.*



JURISDICTION OF THE COUNTY COURT

By contrast, the jurisdiction of the County Court is created and limited by statute. The kinds of cases the County Court can hear are defined in the *County Court Act*¹¹ in terms of monetary limits, subject matter, and territorial limits.

Although it was originally modelled on the English County Court system, ours is a very different court from the English County Court. It has a much broader area of responsibility. Unlike the English County Court which never exercised criminal jurisdiction, the County Court in British Columbia has from its beginning played a major role in criminal justice. The vast majority of criminal cases at the superior court level are heard by County Court Judges.

Its civil jurisdiction has also gone far beyond what has ever been granted to the English county courts. The greater distances between population centres have led to the development of our County Court as major players in the administration of justice throughout the Province.¹²

The general principle is that the more serious cases, both civil and criminal, are to be heard in the Supreme Court and the remainder in the County Court, but there has never been an absolute distinction between the duties actually performed by the two Courts. Almost any case that can be heard in County Court can also be heard in Supreme Court¹³ and in fact many cases that are essentially 'County Court cases' are brought in the Supreme Court for reasons that are not entirely clear.

MONETARY LIMITS

The monetary limit on County Court cases - \$50,000 or \$100,000 where title to land is in question - has lost much of its significance as a number of enactments and rules have brought the jurisdictions of the two Courts more and more in line with one another.

For example, the County Courts have the power to try any action that could be brought in the Supreme Court, if the parties agree.¹⁴ And certain cases brought in the Supreme Court may be removed to the County Court upon the application of a party.¹⁵

11. R.S.B.C. 1979, c.72.

12 Russell, *supra*, note 4, at 265.

13. There are exceptions, such as murder charges which must be heard in Supreme Court.

14 *County Court Act*, s.23.

15 *County Court Act*, ss. 56(1) and 57(1).



If a person brings a claim in County Court for more than \$50,000 and the defendant does not dispute the Court's jurisdiction, then the Court is not bound by the \$50,000 limit and can make any award that a Supreme Court Judge could make¹⁶.

SUBJECT MATTER LIMITATIONS

A 1984 amendment gives the Chief Justice of the Supreme Court the power to order that any action brought in the Supreme Court (except those under certain specified statutes) be tried in the County Court. Those statutes are listed in s.11 of the *Supreme Court Act* and actions under them must go to the Supreme Court even if they are quite straightforward or involve small sums of money - a simple 'slip and fall' case under the *Occupiers Liability Act*, for example.

On the other hand, certain statutes - notably the *Builders Lien Act* - require actions under them to be heard in the County Court. These actions can be extremely complex and involve huge amounts of money but they must remain in the County Court.

LOCAL JUDGE JURISDICTION

There is one further, very significant feature of the County Court Judges' jurisdiction which calls into question the rationale for continuing the two-tier court system. That is the 'Local Judge' jurisdiction.

Since 1891, all County Court Judges have been designated 'Local Judges of the Supreme Court'. Their powers as Local Judges have varied through the years, but the result is that many County Court Judges spend about half their time on the bench sitting as Local Judges of the Supreme Court, exercising the powers of a Supreme Court Judge.¹⁷

Almost all Supreme Court Chambers applications outside of Vancouver are heard by County Court Judges sitting as Local Judge,¹⁸ as are almost all matrimonial matters, both trials and Chambers applications, outside of Vancouver.

¹⁶ *County Court Act*, s.22.

¹⁷ Supreme Court Judges' Submission to the Committee, at 13.

¹⁸ County Court Judges' Submission to the Committee, at 4.



GEOGRAPHIC JURISDICTION

County Court Judges are almost always appointed to a particular County but they can be appointed at large.¹⁹ Every Judge of the County Court has jurisdiction throughout the Province.²⁰

ADMINISTRATION OF THE COUNTY COURT

The expansion of the Local Judge jurisdiction and the 1984 amendment mentioned above have had an important administrative effect: whenever the Supreme Court civil list is overloaded anywhere in the Province, the Chief Justice of the Supreme Court can and does order trials to be heard in the County Court - usually those cases which appear to be within the monetary jurisdiction of the County Court, and motor vehicle accident cases.

This is possible because of provisions in the *County Court Act* which give the Chief Justice of the Supreme Court powers of 'general supervision' of the County Court Judges.²¹ The grant of this general power of supervision in 1973 allowed the sharing of the work of the two Courts in both criminal and civil cases and the equalization of workloads: it allowed the Supreme Court to take advantage of down-time that was occurring in some of the County Courts in the Province.

The position of Chief Judge of the County Court was created later.²² That Judge is 'subject to the direction of the Chief Justice of the Supreme Court'.

RESIDENCE OF SUPREME COURT JUDGES²³

The Supreme Court is a circuit court for all the Province.

All of the Judges of the Supreme Court live in the Vancouver area and have traditionally done so with two exceptions: many years ago there was a requirement that one of the Judges live in Nelson; and until November, 1973, one Judge was required to live in Victoria. That section of the *Supreme Court Act* was repealed in 1973 and replaced by

19 *County Court Act*, s.5(2).

20 *Ibid.* s. 6.

21 *County Court Act*, s.8.

22 *County Court Act*, s.9.

23 In the Province's early years, the subject of residence of Supreme Court Judges was the subject of heated and prolonged debate between politicians and the judiciary: see Verchere, *supra*, note 3.



what is now s.10 which says that the Chief Justice has the general supervision of the Judges of the Court.

Thereafter, Victoria's needs have been met by circuit judges, and from time to time, by a resident supernumerary (semi-retired) judge. In late 1987 an amendment was made to the *Supreme Court Act* requiring a judge to reside in Victoria. This has not yet been implemented.

SPECIALIZATION IN THE SUPREME COURT

The Supreme Court in B.C., unlike the English courts, has always had a unified structure. That is, the Court is not divided into specialized divisions. Judges accept an appointment to the Court as a whole and all Judges are expected to hear any of the types of cases that come before the Court.

One recent variation is the creation of a Family Division. This is a functional and informal division. Judges are assigned on the basis of the volume of family litigation for limited periods of time. (More will be said about this in the Family Law chapter.) In this way, all Supreme Court Judges have an opportunity and are expected to preside over family law cases.

Merger of the Courts

THE MERGER MOVEMENT IN CANADA

Since Confederation, all the provinces except Quebec have used a similar two-tier model for the structure of their courts. (Quebec has always had one large superior court.) But a trend has developed in the other provinces in recent years toward merger of the two levels of Courts.

The movement may have begun in 1934 when Ontario's County Court Judges proposed merger to their Attorney General.²⁴ This proposal was made again by the Judges, this time to the Ontario Law Reform Commission, in 1971. The commission rejected the proposal in its 1973 report. The Ontario Courts Inquiry (Zuber Report) in 1987 recommended a single superior trial court for the province. That recommendation has not been acted upon.

²⁴ Russell, *supra*, note 4, at 268.



In 1975 Prince Edward Island's three County Court Judges were promoted to the Supreme Court, resulting in a single trial court for that province.²⁵

Alberta's Court of Queen's Bench was formed in 1978, by the merger of the district courts and the trial division of the Supreme Court.

The following year, New Brunswick merged its County Courts and the Queen's Bench division of the Supreme Court to form the Court of Queen's Bench of New Brunswick.

In 1980, Saskatchewan merged its District Courts into its Court of Queen's Bench.

In 1983, Manitoba merged its County Courts with its Court of Queen's Bench.

And in 1986 Newfoundland merged its District Courts with the trial division of its Supreme Court.

British Columbia, Nova Scotia and Ontario are the only three provinces that retain both a County and Supreme Court.

THE ARGUMENTS IN FAVOUR OF MERGER

Those who favour merger of the two Courts generally refer to one or both of the following sets of reasons:

First: The two Courts now perform virtually the same functions and there is no reason to continue two Courts with essentially side-by-side jurisdiction. Administratively, it is easier to equalize the workload among members of one large Court. If divisions are to be created, such as the Family Division now operating in Vancouver, that will be more easily accomplished with one large Court.

Second: Merger is necessary to meet the needs of those who live outside the Lower Mainland of the Province. Mounting pressures on the Vancouver trial list have resulted in declining service by the Supreme Court in the rest of the Province.

To give an example: a number of cases may be set for a civil assize in an up-country location. If several of those cases settle three or four days before the beginning of the assize, the Chief Justice would commonly order those remaining cases to be sent to Vancouver. The volume of work did not justify sending a Supreme Court Judge

²⁵ *Ibid.* at 270.



away from Vancouver where every minute of his or her sitting time could be fully used. The result was efficient use of judicial time, but at a very great cost and inconvenience to the litigants, their witnesses, and counsel outside the Lower Mainland.

Alternatively, the case could be ordered onto the County Court list. This means that a case that was ready to go to trial in a few days' time would have to stand in line for a County Court date some months in the future. When the assize did go ahead there were very often far more cases than could be heard and this caused another serious problem for litigants.

Assizes are generally a week long but they have often been scheduled to coincide with a holiday weekend, resulting in only four days of sitting time, with 20 to 30 cases set for hearing. Theoretically, all of these parties must be ready to begin their trials on the Monday or Tuesday morning with witnesses subpoenaed and trial preparation complete, even though not all cases will actually come on for hearing. As a practical matter, counsel must monitor the progress of the assize and be ready to proceed when the Court is ready to hear their case.

Cases not heard at one assize often go to the bottom of the list for the next one, five or six weeks later. This need for repeated preparation of a case for trial wastes time and money. An out-of-Vancouver case set for more than three days must wait for a special sitting to be assigned which can take two to three years, unless the parties decide to move the case to Vancouver. These situations are unacceptable, however efficient they may be from an administrative point of view.

Proponents of merger say that if there is one Court with jurisdiction over all cases, these problems will not arise.

THE ARGUMENTS AGAINST MERGER

Those who are not in favour of merger refer to these reasons:

First: Complex cases involving a multiplicity of parties and numerous complex issues of fact and law frequently involve many interlocutory motions and take weeks or even many months of trial time. They require the kind of judicial management that can best be exercised by those judges who are allocated to this work by reason of experience and aptitude.



The vast majority of cases are far less complex and should be processed by procedures that are far less expensive. There should be two Courts, each of which is designed to better respond to the needs of these different kinds of cases. As stated in a major report on the English civil justice system, referring to unacceptable costs and delay in the High Court:²⁶

The root of the problem is that High Court resources are dissipated on low to medium level business, with too many cases handled and tried at too high a level in the system.

A consistent policy of handling cases as low down in the system as is appropriate offers good prospects of delay reduction with no increase in judge power above the level of Registrar.

Merger is seen, not as an issue of competence, but as an issue of service to the public. Society is best served by a system which provides two levels of superior Courts with competent judges at both levels who are committed to different functions yet dedicated to the common goal of expeditious justice.

Second: Recruitment of prospective judges with specialized training and experience gained from many years at the Bar would be facilitated if the member of the Bar who is approached to take an appointment could be confident of the nature of judicial duties he or she would be expected to perform. For example, a specialist in tax law might not wish to spend most of his or her judicial career deciding criminal cases. The difficulty in recruiting the leading members of the Bar to sit on every type of case, rather than in the area in which they have become specialists may result in a diminution of the efficiency of the Court and of the quality of judgments.

Third: A smaller, more specialized Supreme Court Bench would be able to concentrate on developing the law by producing well-reasoned judgments in pivotal cases. A consistent and thoughtful approach will provide leadership and by introducing more certainty into the law will encourage more settlements. Less consistency means not only more trials but more appeals as well, and greater costs for litigants generally.

Fourth: Specialization would permit more efficient administration and processing of the work of both Courts.

²⁶ *Civil Justice Review* (The English Report), (London: Lord Chancellor's Department, 1988) at 17.



The Proposal

Realizing that there is a divergence of thinking on this issue the Committee searched for an alternative that would address the immediate concerns of all and at the same time permit long-range planning toward an ideal solution.

As one writer on judicial reform comments:²⁷

... a long lead-time is needed to effect fundamental changes in a highly stable system of institutions and processes where the key personnel, judges, usually remain in office for the rest of their working lives once they are appointed.

Our court system is only beginning to generate the kind of statistical information on which fundamental and irrevocable changes could confidently be based.

The Committee therefore recommends that all of its other recommendations aimed at increasing efficiency and improving access to the justice system be put in place and allowed to operate for a full three years. During that time, a much more sophisticated information gathering system will be in place.

At the end of three years there should be a reassessment. If it is determined that the overall efficiency of the court system at that time would be improved by merger, then merger should be implemented. When that decision is being made it will be important to compare the prospect of a merged court with all viable alternatives.

RESIDENT SUPREME COURT JUDGES

The Supreme Court must serve all of British Columbia. The pressures created by the Vancouver trial list have restricted access to the Court outside of the Lower Mainland. A major effort is needed immediately to restore the Supreme Court to its position as the Supreme Court for the whole Province.

²⁷ N. Lyon, 'Modelling as an Approach to Judicial Reform' (1981) 1 Windsor Yearbook of Access to Justice 281 at 282.



RECOMMENDATION 9

The Committee recommends appointment of eight Supreme Court Judges who will be resident in locations throughout British Columbia, as follows:

Kamloops:	One
Kelowna:	One
Kootenays:	One
Prince George:	Two
Prince Rupert:	One
Vancouver Island:	Two

It must be emphasized that this recommendation is designed to ensure access to the Supreme Court for residents of the whole Province. While efficiency is always an important consideration, here the dominant and more important consideration is presence of the Supreme Court throughout the four corners of this Province.

These appointments of themselves may or may not require any additional federally-appointed judges. Increased demand may result in a need for more judges but the total number of County and Supreme Court Judges should not necessarily need to be increased in order to implement this recommendation.

Also we recognize that there may be other factors which those responsible for determining the number of federally-appointed judges in British Columbia may wish to consider as this recommendation is implemented. One example amongst others is the situation in Prince Rupert where there is at present only one County Court Judge. Problems of movement to meet this recommendation could arise.

These judges would reside in the locations stated and would travel throughout their respective areas. As well, each judge would sit for a period each year in Vancouver and possibly elsewhere. Judges resident in Vancouver would periodically sit in other districts.



JURISDICTION OF THE COUNTY COURT

Recognizing the proven ability of the County Court Judges in this Province, the Committee recommends further expansion of their jurisdiction.

RECOMMENDATION 10

The monetary jurisdiction of the County Court should be extended from \$50,000 to \$100,000.

In actions where the title to land is in question, it should be increased from \$100,000 to \$200,000, a more realistic figure, given the current value of real estate in this Province.

RECOMMENDATION 11

All motor vehicle accident cases should be initiated in the County Court; a Supreme Court Judge should have authority to transfer a case to the Supreme Court if the amount involved is clearly more than \$100,000 or if the issues are ones that ought to be tried in the Supreme Court.

GEOGRAPHIC JURISDICTION OF THE COUNTY COURT

Although County Court Judges have jurisdiction throughout the Province, they do encounter a problem from time to time in this way: a Judge of the County of Vancouver, for example, may travel to Chilliwack to sit for a week. When he does, his jurisdiction is as a Judge of the County of New Westminster and that jurisdiction can only be exercised in New Westminster. If he hears a criminal case and then wants to adjourn it for a week for a pre-sentence report, he has no jurisdiction to do the sentencing in Vancouver, which may be more convenient for all concerned.

RECOMMENDATION 12

The *County Court Act* should be amended to remove any impediments to the exercise of their jurisdiction by the Judges of the Court, throughout the Province.



LOCAL JUDGE JURISDICTION OF THE COUNTY COURT

Section 11 of the *Supreme Court Act* defines and limits the jurisdiction of County Court Judges sitting as Local Judges of the Supreme Court. That jurisdiction should be broadened.

RECOMMENDATION 13

Section 11 of the *Supreme Court Act* should be amended to broaden the jurisdiction of County Court Judges sitting as Local Judges of the Supreme Court.

Local Judges should be given Chambers jurisdiction under all federal statutes, and under the following provincial statutes: the *Assessment Act*, the *Election Act*, the *Municipal Act*, and the *School Act*.

They should also be authorized to hear trials under the *Family Compensation Act*, *Frustrated Contract Act*, *Insurance Act*, *Insurance (Marine) Act*, *Insurance (Motor Vehicle) Act*, and *Occupiers Liability Act*.

FURTHER REVIEW

The Committee has made a wide array of recommendations, all of which are aimed in one way or another at making the justice system accessible, understandable, relevant and efficient.

RECOMMENDATION 14

All of the procedural changes recommended in this report should be put in place by January 1, 1990.

Three years after implementation of these changes, that is by January 1, 1993, the Attorney General should name a committee drawn from the same segments of society as this committee. The committee should be asked to assess the impact of these changes on the judicial system. If it is determined that the overall efficiency of the Courts would be improved by merger, then merger should be implemented.



The recommended changes in the jurisdiction of the County Court, if implemented, will result in a substantial change in the character of the workload in that Court. This too should be analysed carefully over the three-year period.

Full use should be made of the information gathering capability of the Court's computer system so that the review to be carried out in four years' time can be made confidently, based on adequate information.

During the next four years a new attitude towards combating delay should be developed within the legal community. Canadian Bar Association sections, Continuing Legal Education, Bench and Bar committees, Inns of Court, and local Bar Associations will all play an important role. Experience elsewhere has shown that the critical component in altering the pace of litigation is the energy and leadership that comes from the Bench and from the profession.

At the same time the new and enhanced computerized information gathering system which is now being installed in the Vancouver Courthouse will have time to generate a much more sophisticated and useful factual basis for decision-making than is now available.

ADMINISTRATION OF THESE COURTS

Administration of the Supreme and County Courts should continue in its present form. The Committee believes, however, that the workload facing the Chief Justice of the Supreme Court will be such that the appointment of an Associate Chief Justice may be of material assistance to her.

RECOMMENDATION 15

The Attorney General should consult with the Chief Justice of the Supreme Court to determine whether an Associate Chief Justice position would be beneficial, and if so, should create such a position.



NAME OF THE SUPREME COURT

The name of the Supreme Court of British Columbia is a source of confusion to the public: there is a Supreme Court of Canada and there is a Court of Appeal in the Province which is 'superior' to the Supreme Court.

There has been a trend in the western provinces to name their superior trial courts the Court of Queen's Bench. Other provinces use the term High Court of Justice. During the next four years thought should be given to a new name for this Province's highest trial Court. When the committee referred to at Recommendation 14 makes its report, it should at that time propose a new name.

RECOMMENDATION 16

The name of the Supreme Court of British Columbia should be changed to a name that is not confusing to the public.



FAMILY LAW

General

Probably no other area of the law is as many-sided or as emotionally-charged as the law which attempts to deal with the results of a broken marriage.

Husband and wife look for legal solutions to a tangle of problems that may have been years in the making. They may disagree fundamentally about how their children are to be raised. They may quarrel over who should live in the family home, or whether it should be sold. And often they bear the emotional scars of years of unhappy marriage.

The more assets there are in the family, the more potential for disagreement. These assets can be extremely complex, involving income tax considerations, business valuations and corporate finance.

The sad truth, however, for many families breaking up is that there are more debts than assets. Often the central problem is that there is not nearly enough money to go round. These cases daily challenge family lawyers and judges to find solutions that families can live with.

The Committee heard from people whose marriage break-ups had led them through the justice system and who felt badly served. They found the system costly and complex and sometimes insensitive to their needs. There also were criticisms from volunteer groups and others with experience in Family Court who feel that the sheer volume of the Court's workload results in less than perfect justice for many.

The Committee sees this aspect of the justice system as an extremely important part of its mandate and has tried to find solutions that will preserve fairness while reducing delay and expense.



Where Should Family Law Matters be Heard?

BACKGROUND

Both the Supreme Court of British Columbia and the Provincial Court hear family law cases. (The Family Division of the Provincial Court is commonly known as 'Family Court'.)

Family Court Judges hear most of the child apprehension cases under the *Family and Child Service Act*. They hear a great many applications for maintenance and for enforcement and variation of maintenance orders. As well, they hear custody, access and guardianship cases and applications to establish paternity. They also hear *Young Offender Act* matters.

Family Court Judges cannot grant a divorce or annulment and they cannot rule on ownership of assets.

For those things, a person must go to Supreme Court. Supreme Court Judges can do everything a Family Court Judge can do in the family area, and in addition they can grant divorces and annulments and divide the family's assets.

THE PROBLEM

People have criticized this overlap of jurisdictions between the two courts.

Problems have arisen when orders in respect of the same family are made in both the Family Court and the Supreme Court. A common difficulty arises when a wife, for example, applies to enforce a Supreme Court maintenance order in Family Court. She is entitled to do this but often her husband responds with his own application to change (vary) the order. A Family Court Judge cannot vary an order of the higher court. The Judge can simply enforce it. A variation application has to go back to the Supreme Court.

Some people have suggested that the Provincial Court should handle all family matters. Others say they should all go to the Supreme Court. Still others prefer a model which has the characteristics of both courts. Because there is a broad range of family law problems requiring legal determination in all areas of the Province, a multi-faceted solution must be sought.



GEOGRAPHIC ACCESSIBILITY

The first advantage that the Family Court has for such a far flung population as ours, is that it reaches almost every corner of the Province.

Family Court Judges sit in 94 locations throughout British Columbia. They don't sit in all 94 places every day. Some places such as Gold River and Lower Post are visited only every second or third month. Others have Family Court several days a month. The Lower Mainland has 10 full-time Family Court Judges sitting every day.

The Supreme Court, by contrast, hears family cases only in the Province's 20 largest cities and towns.

PRE-TRIAL PROCEDURES

Family Court aims at simplicity in its procedures and forms. There is very little paperwork involved in bringing or defending a Family Court application.

Supreme Court on the other hand is formal in its procedures and leans heavily toward the written word. A family case in Supreme Court is treated very much the same as any other civil suit and is subject to the same general rules.

People who are not represented by lawyers are generally more comfortable in Family Court. There, the forms are of the fill-in-the-blank variety and the Judges are used to dealing with people acting on their own behalf.

Supreme Court procedures presume that lawyers will be involved. To begin with, someone must produce the 'pleadings' - the documents that set out the essentials of the claim and the defence - and these can be quite technical.

Supreme Court on the other hand has a process not available in Family Court, known as 'Chambers'. This is where pre-trial applications can be made to a Judge on very short notice. An application in Chambers requires a written notice of motion and supporting affidavits setting out the facts.

Perhaps the feature which most distinguishes Supreme Court from Family Court is its range of pre-trial 'discovery' procedures. These are the procedures that each side can use to learn about the other side's case so that they can make rational decisions, but they are not easily managed by someone who is not legally trained. The more complex discovery procedures are often unnecessary where the family's finances are simple.



Litigants certainly may represent themselves in Supreme Court but they will find it difficult. It is very much a lawyers' forum.

The result of all these procedural differences is that cases involving significant amounts of money usually end up in Supreme Court and those without, in Family Court. Different kinds of cases demand different treatment.

There must be a place where people with very little money at stake can go for an inexpensive resolution to their problems. At the same time, people with complex financial arrangements need a court where they can thoroughly explore all of the relevant issues.

SUPPORT SERVICES

The Family Court has available to it a network of support services including family court counsellors and social workers whose services are available free of charge to people making or defending a claim in Family Court.

The Supreme Court has insufficient support services.

CONDUCT OF TRIALS

Trials in Supreme Court are apt to be longer because of the issues involved. But they are also more likely to be heard from beginning to end without interruption.

A common complaint the Committee heard about Family Court was that not enough time is reserved for individual Family Court hearings. If a case is not concluded at the first session, it may be weeks or even longer before it can continue. If this happens even once it becomes difficult for the Judge to deal with the issues effectively. In fact, it sometimes happens several times to a single case and the Committee finds this unacceptable.

PROPOSAL

We believe that all family matters should fall within the jurisdiction of one court, and that should be the Supreme Court of British Columbia. At the same time, the accessibility of the Provincial Court throughout the Province, and its summary, informal procedures cannot be sacrificed.

The Committee therefore proposes a model which would take advantage of the features of both courts. Judges in both courts would continue to hear the same kinds of cases that they now hear. The



difference would be that Provincial Court Judges would be appointed as 'Masters of the Supreme Court of British Columbia' and when hearing family law cases they would do so in that new capacity.

Their status would not change. They would be styled as 'Provincial Court Judge sitting as a Master of the Supreme Court' much as a County Court Judge sits 'as a Local Judge of the Supreme Court'.

Litigants would have the convenience of continuity. A file that starts as a 'Family Court' application will actually be opened in the Provincial Court Registry as a Supreme Court file. If later one of the parties applies for a divorce or a family property determination (which can only be done in Supreme Court) the file is easily transferred to a Supreme Court Registry.

From the parties' point of view, the same procedures will continue to be available as are now.

RECOMMENDATION 17

The Supreme Court of British Columbia should have exclusive jurisdiction over all family law matters under the *Family Relations Act* and under the *Divorce Act*.

Provincial Court Judges should be appointed Masters of the Supreme Court of British Columbia and in that capacity should continue to hear the types of cases that they now hear.

These would be the features of the new model:

1. Every Provincial Court Registry would be designated for the purposes of proceedings under the *Family Relations Act*, a sub-registry of the Supreme Court of British Columbia (a 'Designated Registry');
2. Provincial Court Judges would be appointed Masters of the Supreme Court of British Columbia having jurisdiction to make orders respecting maintenance, custody and access under the *Family Relations Act*;
3. When sitting in this capacity they would be styled as 'Provincial Court Judge, sitting as a Master of the Supreme Court of British Columbia';
4. Orders made by a Provincial Court Judge sitting as a Master of the Supreme Court would have full effect unless set aside or varied by a Supreme Court Judge;



5. Summary proceedings would be begun in a Provincial Court (Designated Registry) following the same 'Family Court' procedures that now apply. The difference would be that the file would be opened as a Supreme Court file;
6. Supreme Court proceedings would be begun in the Supreme Court by writ or petition as is done now, and would follow the process set out by the Supreme Court Rules;
7. If a matter is in the Supreme Court Registry system, either by commencement or by subsequent transfer, the Provincial Court Judge would have no jurisdiction except to this extent: the Provincial Court Judge could still enforce:
 - a) orders for maintenance or custody, whether made by a Supreme Court or a Provincial Court Judge; and
 - b) maintenance or custody provisions of any Separation Agreement which is filed for enforcement;
8. A proceeding, including enforcement proceedings, could be transferred to the nearest Supreme Court Registry. (Transfer to any other Supreme Court Registry could be done either by consent of both parties or by a Supreme Court Order.)¹ Thereafter, all future steps in the proceedings would be taken in the Supreme Court except for future enforcement proceedings;
9. An appeal from a Master would be to the Supreme Court and it would be a rehearing - a hearing *de novo*. The appeal could be filed at the nearest Supreme Court Registry, or at any other Supreme Court Registry by consent or by Supreme Court Order.
10. If a proceeding has been commenced in a Designated Registry, and a party then joins in a claim for divorce, division of property, a restraining order or exclusive occupation of the home, the proceeding would be transferred to Supreme Court.
11. A Provincial Court Judge sitting as a Master would have jurisdiction to vary a maintenance, custody or access order of a Supreme Court Judge or a Separation Agreement which is filed for variation or enforcement in the Supreme Court, with the consent of the parties.

¹ There would be similar provisions for the transfer of files from one Designated Registry to another and from one Supreme Court Registry to another.



12. The enforcement powers under the *Family Relations Act* should be amended so that the same statutory enforcement powers are available to both Supreme Court Judges and Provincial Court Judges sitting as Masters.
13. Support Services, including Conciliation Counsellors and Mediation should be integrated and available at both levels.

In Vancouver, it is strongly recommended that a new location for the Family Division of the Provincial Court be found in the Robson Square facility. This would allow integration of support services and easy transfer of files between registries. It would also allow efficient use of Provincial Court Judges sitting as Masters of the Supreme Court to handle procedural matters, pre-trial conferences, and settlement conferences in Supreme Court proceedings.

This proposal assumes the continued use of County Court Judges sitting as Local Judges of the Supreme Court to hear Supreme Court family cases as they now do.

The *Family Relations Act* would be amended to define 'Court' as the Supreme Court of British Columbia.

The Committee believes that this proposal will have several benefits. It would bring continuity to the conduct of a family law case: a separating couple will have one file throughout the lifetime of their legal relations. It will improve access to the Supreme Court throughout the Province and it will reduce expense for many litigants by eliminating the need to begin new proceedings in Supreme Court.

In addition, use of a single file will enable the full use of a computer case profile database in the management of family law cases.² No amendments to the *Divorce Act* would be required. The amendments would be within the jurisdiction of the Province and would include amendments to the *Family Relations Act*, the Supreme Court Rules and the *Provincial Court Act*.

Specialization of Judges

Supreme Court Judges do not specialize in any formal way. There are judges who, because of their experience and preference tend to hear more of one kind of case than another. But the same Judge who hears a criminal jury trial one week may hear a contract dispute the following week and a personal injury case and a divorce, the next.

2 See chapter: Technology and the Justice System



A few years ago the then Chief Justice decided to create an informal family law division of the Supreme Court in Vancouver. Two Supreme Court and two County Court Judges are assigned for periods of about five months to hear family law trials and Chambers applications.

The system has proven very popular. By dealing with similar issues daily for several months at a time, judges become comfortable with the issues and can deal with them more quickly.

Because a small number of judges are hearing these cases at any one time they develop a consistent approach. This makes for more predictability: lawyers can better advise their clients of the likely outcome should there be a trial. Better predictability means more cases will settle, without the need for a trial.

By rotating in and out of family law, judges develop their knowledge in the many other areas of law which can have a bearing on family cases: trusts, contract, and income tax, to name a few.

RECOMMENDATION 18

The Chief Justice of the Supreme Court of British Columbia should be asked to consider use of an informal family law division similar to that operating in the Vancouver Registry in other major centres where appropriate and where the volume of work may warrant it.

RECOMMENDATION 19

There should be no permanent specialization of Supreme Court Judges in the area of family law.



Pre-Trial Procedures

PRE-TRIAL CONFERENCES

Pre-trial case management conferences are an important tool in litigation generally.³ They are especially important in family law matters.

An early pre-trial conference, held soon after the action is begun, or even earlier, has real potential for narrowing the areas of dispute and pointing the way toward settlement. If nothing more, decisions can be made at this conference about the direction the lawsuit will take.

The more common pre-trial conference is the one that takes place when the case has been set down for trial. At this point, the focus is on sorting out what can be agreed upon and how the time at trial can best be spent.

The overriding concern at every pre-trial is to encourage settlement without a trial. The process has been described as bargaining in the shadow of the law.

REFERRALS ON PROCEDURAL MATTERS

Family law cases can involve a number of 'interim' applications: that is, applications on matters that need to be determined for the time being, in advance of the trial. Some of these are substantive matters: for example, interim custody or support. Others are procedural: for example, an application to force the other party to produce certain documents.

In Supreme Court cases, all of these interim applications are heard by Judges. The Committee believes that Supreme Court Judges should continue to hear those interim applications that are substantive in nature. It is quicker and cheaper for the parties. Early stabilization of the family situation is very important and very often these interim arrangements ordered by the Court become permanent, by the agreement of the parties.

However, Masters could be of great assistance in hearing procedural interim applications. By processing these applications on a daily basis they could become much more efficient than are Judges who deal with them only periodically. Also, a smaller number of Masters

3 See chapter: Pre-Trial Case Management



deciding these issues daily could develop a level of consistency that would ultimately reduce the total volume of applications that are made.

RECOMMENDATION 20

Masters should hear procedural pre-trial applications in Supreme Court family law matters and Masters should conduct case management conferences and settlement conferences where appropriate.

Family Court

RULES OF PROCEDURE

The Supreme and County Courts have sets of rules that lay out the procedures to be followed from the beginning to end of a lawsuit.

There are no such rules in Family Court.

On the one hand, this does allow flexibility and informality. On the other hand, many of those who spoke to the Committee said that this lack of rules can actually work against people who are unrepresented by lawyers and may be intimidated by the court setting. For example, overworked judges attempting to get through their list have been known to make orders without putting the parties on the stand to properly give their evidence.

Unrepresented people often find their cases delayed again and again because the other side has not shown up or has not produced financial information.

RECOMMENDATION 21

The Supreme Court Rules should incorporate a set of procedural rules for application in Designated Registries of the Supreme Court of British Columbia. They should be standard across the Province, and in plain language.



SETTING TRIAL DATES

One of the greatest difficulties with the present Family Court's handling of family matters is that it operates like a criminal court.

If a wife, for example, brings an application to enforce a maintenance order, the Sheriff must serve her husband with the summons that tells him he is to appear in court. The date on the paper is the date for a first appearance. If the husband is not served on time, he will have to be served again, for a later date. Eventually the parties appear and at that time a date is set for a hearing three to four months later.

If the husband does not appear, a bench warrant is issued for his arrest. This procedure is inappropriate for what is a civil matter between two people. It also is very inconvenient and often expensive for people to have to appear in court simply to set a date for a hearing.

Hearing dates should be assigned by the registry just as they are in Supreme Court or Small Claims Court where there is no need for the parties to appear until that date.

Just as in other civil proceedings, if a party has been served with notice of a hearing and fails to appear, an order should be made in his absence. In the example above, if the husband did not come to court even though he had been served, the wife would give her evidence and the Judge would make an order. This would have the same effect as any other default order. That is, the husband could come back to court and ask for the order to be changed, but he would have to show some reasonable grounds.

RECOMMENDATION 22

Trial dates should be assigned in Designated Registries of the Supreme Court by the Registry without the need for appearance by the parties.



RECOMMENDATION 23

Rules should provide that if a person who is properly served with notice fails to attend at court, an order could be made in that person's absence which would have the same effect as any default order.

LEGAL COUNSEL IN FAMILY CASES

Many people described to the Committee difficulties faced particularly by women who must apply for support for themselves and their children, and then make repeated application to try and enforce the orders.

If a woman in this situation is unrepresented, she must make the application, prepare her case, examine her witnesses if she has any, and cross-examine her husband. Sometimes she simply gives up in the face of such a prospect.

If unrepresented parties persist, Judges have a much more difficult role than if lawyers are involved. They must take the time to see that issues are properly explored. Often delays and adjournments are required, while people go off to collect the information they should have had.

It is much hoped by the members of the Committee that the new Family Maintenance Enforcement Program and recent amendments to the GAIN legislation will alleviate many of these problems.

The Committee believes that it is advisable, where possible, that spouses be represented in family law matters by counsel. The long term cost to society of inadequate support awards for children is greater than the initial cost of providing representation for a people who cannot afford the cost of legal services.

Ad hoc appointments of legal counsel are the preferable way of providing the service, wherever it is economically feasible.

RECOMMENDATION 24

There should be programs in place to provide legal counsel to participants in family law proceedings who qualify financially.



Child Apprehension

BACKGROUND

The law is capable of very few more drastic steps than removing a child from its family. The *Family and Child Service Act* (FCSA) permits this to be done when a child is in need of protection.

Understandably, there are very strict requirements built in to this procedure. Unfortunately, they do not always work as they should and the family and child suffer needlessly.

Section 11 of the FCSA says the Superintendent of Child Welfare must present a written report to the Court not later than seven days after the child has been taken from the family. This process is called the 'report to court'. At that time the Court must make an order either to return the child to the parents or to place the child in the custody of the Superintendent until further order.

If the child is put in the Superintendent's custody, then the Court must set a date within 45 days for a hearing to decide if the child is in need of protection.

NOTICE TO PARENTS

The Act does not require that the parents be notified of the first hearing - the report to court. This is a very important hearing because it determines where the child will live, probably for at least the next month.

RECOMMENDATION 25

The *Family and Child Service Act* should be amended to require notice to parents under s.11, that is, of the 'report to court'.

DELAY

This temporary placement can stretch out for much longer if the hearing is delayed again and again. In fact the hearing which is to be held 45 days later has almost routinely become a date to set another date for the actual hearing. Then too little time is allotted for the hearing, so it has to be continued at a later date. This problem is particularly acute in communities where Provincial Court Judges visit for only one or two days at a time.



Some cases go on this way for 12 to 18 months. For a child this is a very long time and the damage to the child and to the family can be irreparable.

DISCLOSURE

The Act does not require the Superintendent to let the parents know what is in the file. They are left to defend themselves against accusations that may never be made clear to them and are therefore difficult to defend.

RECOMMENDATION 26

The *Family and Child Service Act* should be amended to require the Superintendent to make full disclosure of the file to the parents. The only exception should be to give the Superintendent the right to preserve the identity of informants.

VARIATION

Another problem the Committee heard about often is that the Court is given no authority to vary an order that it makes at the report to court stage. In some cases, for example, a relative may come forward and offer to care for the child until the hearing. If an order has already been made under s. 11 the Judge has no power to change that order.

RECOMMENDATION 27

The *Family and Child Service Act* should be amended to allow for variation of Orders under s.11 and s.13.

AVAILABILITY OF JUDGES IN OUTLYING AREAS

In outlying areas a Provincial Court Judge is often not available for a 'report to court' within the required seven days from the date of apprehension. The Chief Judge then authorizes a Justice of the Peace to make an order under s. 11.

The Committee feels that this is inappropriate unless the order is being made with the consent of the parents. A child's welfare warrants the attention of a Judge.



RECOMMENDATION 28

A Judge must be made available for the report to Court, as required by s. 11 of the *Family and Child Service Act*, even if it is administratively difficult to do so. These orders should not be signed by Justices of the Peace unless made with the consent of the parents.

CONTINUITY BETWEEN COURTS

If there is a case under the *Family and Child Service Act* in the Provincial Court of British Columbia and a case in the Supreme Court of British Columbia involving some of the same children, (a custody application in a divorce proceeding, for example) the proceedings must be transferred to the Supreme Court.

The Committee feels that the Supreme Court should have exclusive jurisdiction under the *Family and Child Service Act*. This could be accomplished with the appointment of Provincial Court Judges as Masters of the Supreme Court as described above.

Cases would be heard as they are now, by Provincial Court Judges except that under this proposal they would be sitting as Masters of the Supreme Court. Provincial Court Registries would be Designated Registries of the Supreme Court for this purpose.

Appeals from an interim decision of a Provincial Court Judge sitting as a Master would be heard in Supreme Court. Child apprehensions are such a fundamental interference in the relationship between parent and child that there should be a right to a full rehearing, on new material if necessary.

Appeals from a final order should be heard by the British Columbia Court of Appeal.

RECOMMENDATION 29

The Supreme Court of British Columbia should have exclusive jurisdiction under the *Family and Child Service Act*.



RECOMMENDATION 30

Every Provincial Court Registry (Family Division) should be, for the purposes of the *Family and Child Service Act*, a Designated Registry of the Supreme Court of British Columbia.

RECOMMENDATION 31

Provincial Court Judges should be appointed Masters of the Supreme Court of British Columbia for the purpose of hearings under the *Family and Child Service Act*.

RECOMMENDATION 32

Appeals from a Master on an interim order should be by rehearing (*de novo*) by a Judge of the Supreme Court of British Columbia.

RECOMMENDATION 33

Appeals from a final order of a Master should be heard by the British Columbia Court of Appeal.

Family Advocates

BACKGROUND

A Family Advocate is a lawyer who is appointed to represent the interests of a child before the courts. It may be a custody dispute between parents or an apprehension proceeding in which the Superintendent of Child Welfare feels the child needs to be taken from the parents. Family Advocates are appointed by the Attorney General and paid from public funds.

Until 1982 there was in place in this Province an excellent system under which Family Advocates were appointed as necessary. With budgetary restraint, that program was ended. Now there is only one



Family Advocate serving all of British Columbia, and some very rare ad hoc appointments.

Many people expressed to us the belief that the appointment of a Family Law Advocate in a particular case facilitated settlement of a difficult custody fight which otherwise would have gone to trial. Custody issues need special treatment and any assistance which can be made available to the Court should be provided.

At the same time, the Committee recognizes that prior to 1982, there were many appointments of Family Advocates which were unnecessary.

THE PROPOSAL

The Government of the Province of British Columbia has given its commitment to strengthen the family. It should be remembered that many families in our Province are single parent families. Spouses with children must continue to deal with each other after separation and in many cases for many years.

The Family Advocate can play a very positive role in seeing that the family relationships that are vital to the child's well being are preserved to the fullest extent possible.

In many cases, the Family Advocate can bring about an agreement by focusing not on the right or wrong of either side but on the best interests of the child. The Family Advocate also serves to isolate the child or children, as much as possible, from the emotional fallout of legal proceedings between parents.

RECOMMENDATION 34

Government funding, both Federal and Provincial, should be made available for the appointment of ad hoc Family Advocates in cases where a Judge decides it is appropriate. The cost of the Family Advocate should be paid by either or both parties to the extent that they can afford to pay.



Disclosure in Family Matters

The disclosure of facts is an important part of all civil proceedings. Disclosure of financial facts is of the utmost importance in family proceedings, particularly maintenance proceedings.

REQUIREMENT TO DISCLOSE

Very often maintenance applications have to be adjourned because one of the parties has failed to provide the other with the required financial information. This happens even when a demand for the information has been made well in advance of the hearing date.

The *Family Relations Act*, s.60 does require each party to provide the other with financial information upon request. If a party fails to comply reasonably to the request, the Court can impose a fine of up to \$5,000. The Act does not define what is meant by 'reasonably' and this penalty provision is not used by the Courts.

A further problem arises when a spouse owns a company or an interest in a company. It can be very difficult for the other spouse, and often the Court, to get a true picture of that person's financial situation.

Section 60 of the *Family Relations Act* and the Divorce Rules should both be amended so that either party must produce the stipulated financial information to the other within 21 days of a demand being delivered.



RECOMMENDATION 35

Section 60 of the *Family Relations Act* and Rule 60B(28) of the Divorce Rules, should be amended to stipulate that a demand for financial information must be complied with within 21 days of delivery.

A party should be required to produce copies of:

- a) current financial statements,
- b) a statement of assets and liabilities, and
- c) complete recent corporate tax returns,

for any closely-held corporation in which he or she has a controlling legal or beneficial interest. This includes a corporation in which the party owns more than 50% of the issued shares.

The same obligation to produce would be imposed on the corporation itself.

The recipient of this sensitive financial information must be under an obligation of the strictest confidentiality.

STATEMENT OF PROPERTY

Early disclosure of all relevant financial information is critical to the early resolution of issues and proper preparation of a case.

It was suggested to the Committee that the Statement of Property form which is now required by Rule 60 be expanded to set out the assets and liabilities, and each spouse's position with relation to those assets. The proposed Statement of Property would also disclose values at the date of acquisition, separation or triggering event, and at the date of swearing of the Affidavit.

RECOMMENDATION 36

The form of Statement of Property should be expanded to provide for the identification and value of assets as at date of acquisition, separation date, and the date of swearing of the Affidavit.

There should be a clear requirement that all legal and beneficial interests must be disclosed.



INVESTIGATIVE REPORTS

Section 15 of the *Family Relations Act* allows the Court to direct an investigation into a family matter by a family court counsellor. The counsellor is required to serve a copy of the investigative report on every party to the proceeding, but that only has to be done 24 hours before the report is filed with the Court. This does not give the parties involved enough time to respond to the contents of the report.

RECOMMENDATION 37

Section 15 of the *Family Relations Act* should be amended to require the investigative report to be served on the parties to the proceeding 30 days before the filing of the Certificate of Readiness.

Family Property:

The Need For Legislative Change

THE PROBLEM

In the not too distant past, it was common for wives to own an interest in the family home and nothing more. The husband earned the family's income and owned whatever other assets there were. On divorce, the wife received her interest in the home and enough maintenance to allow her and the children to live modestly at best.

In recent years, society's views of marriage - and women's expectations - have changed. We have moved toward the notion of marriage as a partnership and this brings with it the concept of 'family assets'. They might be legally owned by the husband or the wife but they belong to the family and when the family breaks up they have to be shared.

Both the federal and provincial governments have passed new laws as they try to keep up with changing times. In this Province, the *Family Relations Act* of 1972 was a step in the direction of more fairness in the division of property. But it never really came to grips with the rapid changes that were taking place in society. It was repealed and replaced.



The new *Family Relations Act* came into effect on April 1, 1979 and the new *Divorce Act* in July, 1986. They both made a serious effort to address the legal problems of the modern family and both have their defenders and their critics.

The effect of the *Family Relations Act* on family property is that as a general rule, those things that are 'family assets' are divided equally between the spouses. But, there are exceptions. It is in the application of those exceptions that the difficulty comes in. Each time a Judge considers the statute and applies it in a particular case, something is added to the law. If the system is working properly, the law evolves in a cautious but thoughtful way to respond to changes in society.

But if the statute is vague or ambiguous, or if lawyers do not properly present their cases, the law will grow less and less certain. Rather than clarifying the meaning of the statute the case law will muddy the waters. When the law is unclear lawyers cannot advise their clients as to the likely outcome of their case and so they have no basis for making an agreement. Every case could go to trial.

A recent study by the Law Reform Commission of British Columbia confirms what many lawyers told the Committee: that there is very little consistency among judicial decisions when it comes to division of family property.

THE PROPOSAL

The problem seems to be that the Act does not contain a statement of the philosophical basis for entitlement to share in family property. Until that statement is clearly made, judges will continue to apply their own ideas as to how marriage affects property rights.

It will be very difficult, given the diversity of our society, to arrive at a consensus on what the marriage relationship entails. But some common ground must be found and it must be clearly stated in the statute.

The cost of not doing so is too great for our justice system and for individual litigants.



RECOMMENDATION 38

The Attorney General of British Columbia, after consultation with the Family Law Section of the British Columbia Branch of the Canadian Bar Association and the Law Reform Commission of British Columbia, should revise the *Family Relations Act* provisions which deal with family property.

The revision should make a clear statement of the principles on which family property is to be shared by spouses or former spouses.

The effect on third parties, for example, trustees in bankruptcy, legal representatives of a deceased spouse and companies, should be considered in any revisions.

Family Property Topics

PENSIONS

When dividing family assets, a judge will often make an order giving one spouse a share in the other's pension. That order may take the form of a 'deferred sharing.' That is, the spouse who owns the pension does not have to pay any of it to the other until such time as he or she starts receiving payments from the plan. Then, a share of each payment must be paid to the non-owning spouse.

This can be difficult to enforce, especially if the pension does not become payable until some years after the divorce. To remedy that situation in respect of Canada Pensions, the federal government has enacted legislation to provide for automatic severance of the pension at the source. When the pension becomes payable, two cheques are sent out for each payment: each spouse receives their share directly.

The federal government has similar legislation in place for pension plans which are subject to federal regulations. The Committee was urged to recommend parallel provincial legislation. The Canadian Bar Association, through a resolution sponsored by the National Family Law Section has made similar recommendations.



RECOMMENDATION 39

Provincial legislation should provide for automatic severance of pension benefits at source when a deferred sharing order or agreement is in existence.

SECTION 53 OF THE FAMILY RELATIONS ACT

The *Family Relations Act* provides:

53. Where a proceeding under this Part has been commenced, the Supreme Court may make an interim order to restrain the disposal of family assets or other property at issue, or for the possession, delivery, safekeeping, and preservation of the property, and this order may be made *ex parte*.

This section of the *Family Relations Act* has been interpreted very narrowly by the Courts. Generally, the Courts have held that where there is sufficient property in the family pot, the freezing order will not be made - even though the Act creates a presumption of a 50% interest in the assets legally owned by the other spouse.

This imposes on the non-owning spouse the task of tracing the assets during the course of litigation. Much evidence is given at trial concerning what the assets were at the date of separation and what has happened to them since.

A presumption that assets in dispute would be 'frozen' would force upon the owning spouse the obligation to consult with the non-owning spouse before disposing of assets during the pre-trial stage.

RECOMMENDATION 40

Section 53 of the *Family Relations Act* should be amended to provide that a restraining order or freezing order will be made, but that it be variable from time to time by order of the Court or the consent of the non-owning spouse, such consent not to be unreasonably withheld.



VALUATION

Valuation of family assets, particularly when a closely held corporation is at issue, can be very expensive for the family law litigant. Accountants fees and valuator's reports are very costly. Much of the expense associated with the valuation of assets is directly related to problems in obtaining financial documents and information from the opposing party.

The owning spouse has no difficulty in obtaining valuations because he or she controls the documents and information.

RECOMMENDATION 41

Part III of the *Family Relations Act* should be amended to compel a spouse to produce for inspection all documents and information which an auditor would require when preparing an audit either of the individual or of a closely held corporation in which he or she has a controlling legal or beneficial interest. This includes a corporation in which the spouse owns more than 50% of the issued shares. The same obligation to produce would be imposed on the corporation itself. The statutory requirement would be subject to any court order to the contrary.

Maintenance

CHILD SUPPORT AWARDS

Judges are asked every day to decide how much money a parent should pay for the support of a child who is living with the other parent. The amount of that support award will have very serious consequences for the child's life, and yet judges are being asked to make these decisions without any real guidelines as to what is appropriate.

A mother can say how much money she spends on groceries in a week, but how is the Judge to decide how much of her rent or mortgage payment to attribute to the child's living expenses?

A father can tell the Court what his housing costs are, but on what basis is the Court to decide whether it is reasonable for the father to operate a car if he cannot afford what the child seems to need?



Many of those who spoke to the Committee feel that child support orders are too low. They feel that the courts place too much emphasis on the needs of the non-custodial parent at the expense of the child.

What is needed is information about the costs of raising a child, that lawyers can use when advising their clients and that judges can use when making support orders.

RECOMMENDATION 42

A study should be undertaken to devise a means of compiling statistical information on the actual cost of supporting a child (including day care costs and the tax effect of support awards) and providing that information on a current basis, in a format that judges and lawyers can easily use.

COMPLIANCE WITH MAINTENANCE ORDERS

Many people have found that when a maintenance order is obtained, the real cost and frustration still lie ahead. Enforcement proceedings - those steps that are taken to force a person to pay what has been ordered by a court - are costly and time consuming and very often fruitless. The Committee very much hopes that the recent Family Maintenance Enforcement Program and amendments to the GAIN legislation will go a long way towards solving enforcement problems.

Another difficulty which has been faced by spouses seeking to enforce maintenance orders is that the other spouse often responds by asking for an order wiping out or reducing the amount of the arrears. If arrears are cancelled or reduced repeatedly, the person who 'won' the maintenance award often gives up in frustration.

The cancellation of arrears imposes hardship on the recipient who should be entitled to rely on receipt, on a timely basis, of the amount that was ordered.

In family law matters, cost of enforcement should be awarded on a scale that is closely as possible compensates the party for his or her actual expenses.⁴

⁴ This applies in Supreme Court only: there are no cost awards in Provincial Court.



More importantly, there needs to be a clear message to the Bench, the Bar and the public that maintenance awards must be honoured.

RECOMMENDATION 43

Costs of all Supreme Court enforcement proceedings should be awarded on a scale to compensate a party as closely as possible for his or her actual costs.

RECOMMENDATION 44

There must be a program of education aimed at the Bench, the Bar and the public, which will impress upon people the importance of complying with maintenance orders. This must be reinforced by a commitment from the Bench to take an active role in enforcing its own orders.

RECOMMENDATION 45

Arrears of maintenance should be reduced or cancelled only in the most extraordinary circumstances. Orders should not be varied retroactively.

When those ordered to pay maintenance realize that those obligations will consistently be enforced against them, many of the problems of enforcement will be alleviated. Meanwhile, the courts should have available the means of requiring employers to directly remit maintenance payments that an employee is required to pay, when there has been default. The Family Relations Act contains such a provision but it is available only in Family Court and is not in wide use by judges.



RECOMMENDATION 46

The provisions of the Family Relations Act requiring an employer to remit maintenance payments directly, on behalf of an employee, should be available to the Supreme Court as well as the Family Court. In both courts these orders should be granted routinely in cases where default has been established.

Costs and Fees

Other chapters in this report deal with issues involving the cost of litigation. The recommendations regarding costs in Chambers applications have particular relevance in family matters.

Another problem with respect to costs in family matters is that the spouse who does not have control and possession of the assets is the one who has to pay the initial filing fees and other costs such as valuation - and that is often the spouse who is least able to afford it.

RECOMMENDATION 47

In all proceedings under the *Family Relations Act* and the *Divorce Act*, there should be provision for the spouse who is dependent on the other for support, to apply to receive from that spouse at an early stage the estimated costs of the litigation.

Alternate Dispute Resolution

For as long as people have lived together in families they have had to find ways of sorting out their problems when those families break up.

Our court system has developed over centuries as a forum where people can go if they have not been able to arrive at a solution on their own. But it is not the only place. People have always turned to friends, relatives, clergy and others for help in resolving these disputes.

In recent years, people have come forward whose business it is to mediate family disputes - to help the parties arrive at solutions that



they both can live with. Their service can be very attractive for a number of reasons. It tends to give the couple themselves more control over the proceedings. It is private. And by focusing on solutions for the future instead of battles in the past, it hopes to lessen hostility and allow people to go on with their lives. This can be especially valuable when two people are parents to the same children.

There have been many calls for mandatory mediation of family disputes. Some ask for at least an initial exposure to the mediation process. Others would limit the requirement to those cases that involve children. The Committee favours mediation of family disputes in appropriate cases. However, it does not see mediation as a cure for all ills.

First of all, this profession is in its infancy. There are as yet no educational standards and no system of certification.

Second, it has not yet been proven that parties who mediate their disputes go on to have a better relationship, as parents or otherwise, than parties who go through the court system.

Third, it may well be adding another layer of cost to an already expensive process. Each party still needs to be independently advised of his or her legal rights. To this is added the cost of a mediator who probably charges from \$60 to \$125 per hour for an average of four to six hours.

There is another, larger reason for rejecting the notion of mandatory mediation of all family disputes.

Our law is a living thing. It changes slowly but it does change. It responds not to fads or whims but to real social developments. Mediation, because it is conducted in private and on a case-by-case basis, lacks this quality. Each family deals with its own problems in isolation. If litigation had been replaced by mediation in the early 1970s, women's positions in the resolution of unhappy marriages would have been fixed at a position which we today would consider to be grossly unfair.

There is definitely a place for voluntary mediation of family disputes: spouses who genuinely want to resolve their differences and who need a neutral person to help them accomplish that, should have access to mediation services.

They need a reliable means of choosing a qualified mediator.



The Law Society of British Columbia does allow lawyers who have taken the required mediation course to advertise themselves as Family Law Mediators. But any non-lawyer can adopt the same title with or without any training. Also, there are some who feel that the course now offered to potential mediators is not entirely adequate.

The recently-announced Nathan T. Nemetz Centre for Dispute Resolution at the University of British Columbia might well undertake a study which would lead to a set of standards for training of mediators and a program of certification.

RECOMMENDATION 48

Mediation should be encouraged as a constructive method of resolving disputes.

RECOMMENDATION 49

Participation by spouses in mediation should be on a voluntary basis.

RECOMMENDATION 50

Steps should be taken immediately towards a formal program of certification of family mediators.

Physical Facilities

THE PROBLEM

In today's world, where separation and divorce is widespread, Family Court becomes an all-too-familiar setting for many. Some of the buildings are shabby. Even some that are quite new can be too crowded. Spouses are forced to relate to their lawyers the intimate details of their family life either in packed corridors or in small washrooms, if they wish privacy.



A wife who has been beaten by her husband may have to sit within arm's reach of him on a crowded bench as they wait their turn in court.

The Vancouver Family Court at Yale Street is an example of a facility which is overrun by the volume of its work and entirely inappropriate to its business. We have addressed the issue of its relocation earlier in this report.

THE PROPOSAL

The physical surroundings in which families resolve their differences and come to grips with the reality of their new lives should allow them to do so with some degree of dignity.

RECOMMENDATION 51

The location and physical surroundings of any Family Court should reflect the importance of that Court's role in the community.

Family Courts should have waiting areas that do not force family members who are at odds with each other to share the same close quarters. Adequate and private interview rooms are essential.

Hours of Court Operation

People who come to Family Court usually are there in one way or another because of a lack of money. If a person is employed it is asking a lot for that person to miss several days of work as he or she comes back again and again to Family Court either because the other spouse did not appear or because the hearing could not be completed.

For those who are unemployed, repeated attendances at court can be expensive and difficult. Babysitting may be especially hard to come by in the day time.

THE PROPOSAL

The Committee recognizes that the hours of sitting of Family Court Judges are within the authority of the Administrative Judge of the Court. However, the Committee suggests that where the volume of



work warrants it, the Court might consider evening or weekend sittings as a way of offering greater access to their service. It may be that the availability of one or two evenings a week, or one Saturday morning, could lessen the hardship of Family Court appearances for many people.

Another approach that might be tried either in conjunction with expanded sitting hours or not, would be extended hours of availability for Family Court Counsellors. These people play a valuable role in helping spouses sort out the issues between them and often can develop an agreement without the necessity of a trial. Whether court is sitting or not, many people would appreciate being able to meet with a counsellor in the evening or on a Saturday.

RECOMMENDATION 52

Where the workload warrants it, the Administrative Judge of the Provincial Court should consider extending sitting hours to include evening and Saturday hours.

Additionally, consideration should be given to extending the hours of availability of Family Court Counsellors.

Registration of Separation Agreements

Section 74 of the *Family Relations Act* provides for the filing of a Separation Agreement in Provincial Court for variation or enforcement. The effect of filing is to give certain provisions in a Separation Agreement respecting custody, maintenance and access the force of a Court Order. Since there is no similar provision for filing a



Separation Agreement in Supreme Court, counsel must appear before a judge to apply for an order that it be filed. This creates unnecessary cost and delay.

A simple method of registering Separation Agreements in the Supreme Court should be made available.

RECOMMENDATION 53

The *Family Relations Act* should be amended to provide for the filing of Separation Agreements in Supreme Court, by consent, for enforcement or variation.



CRIMINAL LAW & PROCEDURE

General Principles

The Justice Reform Committee heard from many people who are concerned about the criminal law and the way our courts handle criminal cases.

There were valid criticisms and creative suggestions from people who are well-informed about the criminal justice system. Other submissions reflected a fundamental misunderstanding of the true role of our criminal law. They represented some popular notions about the criminal law - that 'most accused go free'; 'criminals on parole regularly reoffend'; and 'the consequences of crime are not significant'.

Those familiar with the criminal justice system know that these notions are false. Full acquittals are not easily won. Most parolees do not reoffend. And Canada puts more of its people in prison, per capita, than any country in the western world except the United States.

Public education must be a priority for government and for the legal profession if the criminal justice system is to enjoy a high degree of public confidence.

On the whole, however, the Committee has been left with an impression of a criminal justice system that is working remarkably well. This Province enjoys a corps of Crown Counsel, criminal defence lawyers and police who are skilled, hard-working and professional. The judges hearing criminal cases are better qualified for their work than ever in the past. And large volumes of cases are processed with very little delay.

FEDERAL AND PROVINCIAL AREAS OF RESPONSIBILITY

Criminal law and criminal procedure are within the jurisdiction (authority) of the Federal government. The provinces cannot make or



change criminal law but they do have authority over the administration of justice. This includes the organization of the Provincial Courts.

Many submissions to the Committee concerned areas of the law which the Province cannot deal with. Sentencing practices are a good example.

This report will limit itself for the most part, after a brief discussion of principles, to those issues that are within the area of provincial authority. The substantive criminal law is outside that realm. Also, many areas of the criminal law are the subject of major studies now under way by the federal Department of Justice, the Law Reform Commission of Canada, and the Canadian Bar Association and this Committee will not attempt to duplicate that work in any way.

BASIC PRINCIPLES

A discussion of all the complexities of the criminal law is far beyond the scope of this report. However, an understanding of some fundamental principles is essential to any thoughtful examination of the criminal justice system.

These principles are:

- the presumption of innocence;
- reasonable doubt;
- strict application of the rules of evidence and procedure;
- the confession rule; and
- the *Charter of Rights*

THE PRESUMPTION OF INNOCENCE

In criminal cases, it is the Crown prosecutor who must prove that the accused is guilty. If the Crown cannot prove it, the accused must go free. In other words, the 'onus of proof' is on the Crown.

Closely tied to this is the rule that an accused person cannot be required to give evidence. This is referred to as the 'non-compellability of the accused'. No other branch of the law protects one party to an action in this way. The Crown must prove its case and it may not require the accused to give an explanation.

REASONABLE DOUBT

This is the *standard* of proof that the Crown must meet in criminal cases. Guilt must be proven beyond a reasonable doubt. By contrast, in civil cases, the case must be proved 'on a balance of probabilities'.



It is difficult to describe exactly what proof beyond a reasonable doubt means. It is something less than absolute certainty but it has been equated with moral certainty. The standard of reasonable doubt is an important safeguard to the individual charged with a crime.

THE STRICT APPLICATION OF RULES OF EVIDENCE AND PROCEDURE

Because conviction of a crime is an extremely serious matter, our criminal justice system insists on strict compliance to rules of evidence and procedure. Some of these are easily misunderstood by the public as tending to let the guilty go free. An example is the rule against hearsay. In our everyday lives we regularly rely on second-hand information. But in a criminal court, evidence of what someone else who is not in the courtroom has said, is not allowed (with certain exceptions) simply because it is not reliable.

THE CONFESSION RULE

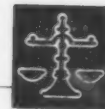
This is another rule which is often misunderstood. Sometimes a person accused of a crime will have made a confession to, say, a police officer. Yet the judge refuses to allow that confession in as evidence. The reason is that a statement is only admissible if the Crown can prove that it was made voluntarily.

Statements made under promise of *favour* or threat of physical harm, for example, might not be true. People will tend to say whatever they feel will get them out of an uncomfortable situation. And we do not want our police officers to resort to such methods to obtain confessions.

CHARTER OF RIGHTS

The Canadian *Charter of Rights* firmly entrenches in our Constitution certain rights which before 1982 existed at common law or under statute. The protections that the Charter guarantees to those accused of crime reflect historical efforts to offset the much greater power of the state.

Some people who spoke to the Committee felt that the notion of rights for 'criminals' is offensive. But there are no 'criminals rights' or 'victims rights' - they are the rights of all. The extent to which a society protects and furthers the rights of each one of its members is the final measure of the vitality of the democratic system.



The Crown Counsel Office

GENERAL

The criminal defence lawyers and Crown Counsel of British Columbia have a tradition of camaraderie and free exchange of ideas and information which we believe is not enjoyed to the same extent elsewhere. These traditions and relationships must be maintained.

The independence of the Bar is another cornerstone of our justice system. The Law Society said in its brief to the Committee:

(I)n the context of the criminal law, this includes the maintenance of a capable, vigilant, informed and courageous criminal defence bar. It also refers to the maintenance of a professional corps of prosecutors with a strong sense of public duty befitting such position.

Continuing Legal Education which enhances legal skills among the practising criminal bar is essential.

FUNCTIONS OF CROWN COUNSEL

Crown Counsel in this Province carry out many functions. They prosecute cases at all levels of Court. They decide which charges, brought forward by the police, will be prosecuted. They deal with members of the public and the media, and they perform a host of administrative duties. Some Crown Counsel prosecute a wide range of cases while others specialize in areas such as commercial crime or child sexual abuse.

STRUCTURE OF THE CROWN COUNSEL OFFICE

TERMS OF EMPLOYMENT

The work of Crown Counsel in this Province is divided among three distinct groups

- permanent staff;
- contract prosecutors; and
- ad hoc prosecutors.

The permanent staff are those people who have made and expect to continue to make the job of Crown Counsel a career. Those who act



as Crown Counsel on a contract basis may continue to do so over a period of years, but they have no reasonable expectation that their contracts will be renewed indefinitely. The third group are members of the private bar undertaking Crown work for an hourly or daily rate.

The Committee heard from various sources that Crown offices typically are short of support staff and normal office equipment. They do not have the resources available to the average law firm.

SPECIAL UNITS

Recent years have seen the creation in Vancouver of specialized units within the Crown Counsel office. Examples are the Criminal Appeals and Special Prosecutions Offices and the Commercial Crime Division. These three special branches of provincial prosecution should be supported. They represent three distinct areas requiring high levels of skill and knowledge, particularly in view of the complexity of the law since enactment of the *Charter of Rights*.

AD HOC CROWN COUNSEL

In the 1970s ad hoc work was generally restricted to jury trials and special prosecutions. Typically, the Crown hired senior members of the defence bar to prosecute a full assize - four or five major criminal trials. For each case, a junior would be assigned from the Crown office. This system allowed the private bar to participate in Crown work and gave junior prosecutors the chance to learn from senior counsel.

Today, Crown Counsel rarely assigns junior prosecutors to work with ad hoc counsel. Cases are parcelled out at all levels to members of the private bar. The system breaks down when lawyers are called in with very little time for preparation to prosecute whatever cases are set for hearing in a given courtroom.

A healthy criminal bar is one in which the participants are familiar with the handling of cases on both sides. Unquestionably there is a place for ad hoc work in any Crown Counsel office, if properly administered.

CROWN COUNSEL INTERCHANGE PROGRAM

If it is important for members of the private bar to prosecute cases in order to promote understanding within the system, it is equally important that Crown Counsel have the opportunity to work on the defence side. In 1986, the Ministry of the Attorney General established



the Crown Counsel Interchange Program with this opportunity as its goal. Under the program, Crown Counsel are occasionally permitted to work with a senior defence lawyer on a trial of limited duration. To date, a healthy number of Crown Counsel have taken part and their reactions have been positive.

THE PROBLEM

The Committee heard many criticisms of the present state of the Crown Counsel office. None of these were directed at the members of that office themselves. Individual Crown Counsel were almost invariably described as being hard-working and conscientious.

Rather, critics point to a lack of funding resulting in prosecutors being overworked and without the resources to do their jobs properly. Defence lawyers said they have problems preparing their cases when Crown Counsel are too busy to discuss files with them before trial.

Volunteers who work with victims of crime talked about the frustration felt by people drawn into an unfamiliar and intimidating court system when the prosecutor handling the case is too busy to prepare them for trial; or worse, an ad hoc prosecutor who has just received the file that day is unfamiliar with the facts. Victim and witness representatives also described situations in which a succession of prosecutors handle a single file. Victims, even children, have to tell their stories over and over again, each time to a new face.

Members of the public coming in contact with the justice system must be satisfied that it has addressed their needs and concerns.

As methods of crime detection become more sophisticated and criminal lawyers more specialized, there is an ever-increasing need for a skilled and adequately staffed and funded Crown Counsel office. Government must ensure that Crown Counsel can meet the needs and expectations of British Columbians.

THE PROPOSALS

To serve the public effectively, the Crown Counsel office must offer attractive career opportunities to appropriate candidates. The office should operate like any large law firm.

Lawyers should be hired initially on contracts of one to five years. They should have the reasonable expectation that if they meet the standards of the office they will have the opportunity of being retained



as permanent staff. At that time they **should** be offered either a five-year contract or a public service position. Salaries should reflect skill and experience levels.

Junior members of the Crown Counsel staff should be assigned to work on difficult cases with senior prosecutors, whether they be members of the private Bar hired on an ad hoc basis, or staff Crown Counsel.

Adequate support staff, both clerical and paralegal is essential. Using prosecutors to perform clerical or paralegal functions is a false economy and weakens morale. Office technology must be brought up to date. Word processing equipment, adequate tools for reproducing and binding documents, and dictation equipment should be standard.

Once the offices are properly staffed and equipped they will be able to carry out their function in a way that fosters public confidence in the criminal justice system and treats the participants with respect.

RECOMMENDATION 54

Regional Crown Counsel should have budgets that will allow appropriate levels of staffing and equipment for Crown Counsel offices throughout the Province.

RECOMMENDATION 55

Crown Counsel should be hired initially on contracts of from one to five years with merit the sole criteria for continued employment.

RECOMMENDATION 56

A career path should be established within the Crown Counsel office so anyone who has served in the office for five years and met the appropriate standards would be offered either a five year contract or a permanent Public Service position.



RECOMMENDATION 57

Support for the Criminal Appeals and Special Prosecutions Offices and the Commercial Crime Division should be continued and enhanced where required.

RECOMMENDATION 58

A system of ad hoc Crown Counsel should be maintained, with prosecution work at all levels contracted out to the private bar. However, there should be continuity in the handling of individual cases. Ad hoc counsel should not be put in a position where they do not have adequate time to prepare for court.

RECOMMENDATION 59

The Crown Counsel Interchange Program should be encouraged and enhanced.

The Charge Approval Process

BACKGROUND

In British Columbia, once police have investigated a criminal case, Crown Counsel decide whether or not a charge will be laid.

This is not the case everywhere. In England, for example, it is the investigating or arresting police officer who makes the decision. In Ontario also, the police decide what charges should be laid. However, there are many in Ontario who envy our system. The 1987 Report of the Ontario Courts Inquiry says:

(T)o a far greater degree, Crown prosecutors should be involved in the determination of what charge is to be laid.¹

¹ Report of the Ontario Courts Inquiry (*The Zuber Report*), T.G. Zuber, (Ontario Ministry of the Attorney General, 1987) at 227.



When making this determination, the Crown Counsel considers two factors:

- Is there a substantial likelihood of conviction? and
- Is it in the public interest to lay the charge?

THE PROBLEM

The Committee heard from police and citizens groups who believe the police should be the ones to decide what charges to lay. Police are frustrated when prosecutors decide not to lay charges after they have worked hard on an investigation. They also feel that respect for the police is lowered when Crown Counsel 'second guesses' their opinion and decides not to lay a charge.

On the other hand, the determination of what charges should be laid is a difficult and extremely serious matter. For many people, the damage done simply by the laying of a charge is enormous, no matter what the eventual outcome.

The person making that decision must consider the likelihood of conviction in light of the evidence available, the procedural obstacles that may lie in the way, and the constitutional remedies that might be available to the accused, as well as whether it is in the public interest to proceed with the prosecution.

THE PROPOSAL

The person best able to decide what charge should be laid is one who is knowledgeable about criminal law and who is ultimately accountable for the prosecution of the case. That person is the Attorney General or his agent - Crown Counsel.

However the police should have some recourse when they strongly disagree with a decision not to prosecute. The investigating police authority should be able to have that decision reconsidered at a more senior level in the Crown office. This may be seen as a logical step in the charge approval process. It should remain clear, however, that the ultimate decision remains with the Crown and not the police.

RECOMMENDATION 60

The authority to decide what charges will be laid must remain with the Attorney General or his agent - Crown Counsel.



The Committee recommends the following procedure for review of a charge approval decision:

- A Chief Constable or officer in charge of a detachment who disagrees with the decision not to lay a charge may ask Regional Crown Counsel for a review. Regional Crown Counsel may ask for assistance from Senior Crown Counsel - Special Projects, or may obtain an opinion from a member of the private bar. Regional Crown Counsel will decide and advise the police officer.
- An officer who disagrees with that decision may ask the Assistant Deputy Attorney General, Criminal Justice, to review the matter.
- In addition to these procedures, a Chief of Police or the Deputy Commissioner of the RCMP in the Province may appeal a charge approval decision directly to the Deputy Attorney General if the situation is urgent or a matter of significant public interest or public policy.

RECOMMENDATION 61

A Chief Constable or officer in charge of a police detachment who is dissatisfied with a Crown Counsel decision not to lay a charge, should have the right to have that decision reviewed by Regional Crown Counsel and ultimately the Deputy Attorney General.

Pre-trial procedures

THE PRELIMINARY INQUIRY

BACKGROUND

Everyone accused of a crime makes a first court appearance in Provincial Court. Most cases are dealt with entirely in that court, but certain offences - generally the more serious ones - give an accused the right to a trial in a higher court, and some must be tried there.

If a case is going to a higher court, normally the first step is a



Preliminary Inquiry in the Provincial Court. This Preliminary Inquiry serves several purposes:

- It 'weeds out' the cases that do not merit a trial.
- It gives defence counsel a chance to size up the Crown's case.
- It allows the Crown to test its own case and in some cases to see the nature of the defence that is likely to be pursued at trial.
- It can help to prepare the witnesses for trial.

At the Preliminary Inquiry the Crown calls evidence and the defence may cross-examine. The defence may also call evidence but seldom does. When the hearing is finished, the Provincial Court Judge must decide whether there is any evidence on which a jury, properly instructed by a judge, could convict the accused. If so, the accused is ordered to stand trial.

This is quite a low standard of proof, so almost every Preliminary Inquiry results in a committal for trial.

THE PROBLEM

The Provincial Court Judges call the Preliminary Inquiry a 'colossal waste of time'. They believe that it no longer fulfills its original purpose - that of weeding out cases that do not merit a trial. Other submissions on this subject favoured retaining the Preliminary Inquiry but fine tuning it to make it more efficient.

THE PROPOSAL

Preliminary Inquiries are a safeguard against an accused person being unnecessarily exposed to a public trial. This is true even though an accused rarely is discharged after a preliminary.

A Preliminary Inquiry often leads to a guilty plea to the offence charged, or to some lesser charge. This is because after hearing the evidence at the Preliminary Inquiry both accused and Crown are then in a much better position to assess the facts of the case and the credibility of the witnesses. They can then arrive at an appropriate disposition of the case.

And finally, Preliminary Inquiries lead to better trials. Issues are identified and narrowed and areas of agreement can be admitted.

It has been suggested that better pre-trial disclosure of the Crown's case to the defence could replace the Preliminary Inquiry. The Committee does not agree with that view, although it does favour disclosure. Disclosure, which usually means the exchange of



statements and other documents, is no substitute for actually seeing the witnesses testify under oath.

For these reasons the Committee believes that the Preliminary Inquiry should be retained.

RECOMMENDATION 62

The Preliminary Inquiry should be retained and efforts made to enhance its efficiency and usefulness.

The pre-trial disclosure model that is described below would, the Committee expects, have that effect.

PRE-TRIAL DISCLOSURE

THE PROBLEM

Fairness and efficiency in the administration of the criminal justice system depend largely on the quality of the information made available to people who are accused of crime. Crown Counsel has a duty to disclose the prosecution's case and make the defence aware of all relevant evidence. A possible exception would be in situations where that disclosure would put someone's personal safety at risk.

This duty is a reflection of the true role of the prosecution under our system of justice. The prosecutor's role is not to obtain a conviction. Rather, it is to see that justice is done through a fair trial on the merits: it is to put before the court all the available relevant evidence, whether it would tend to prove guilt or innocence.

The current policy of the Attorney General of British Columbia is to provide full disclosure to the defence. This policy is followed in general by Crown offices in all parts of the Province, although there do seem to be some who take a more restricted view of the duty to disclose.

Even when there is a willingness to disclose, the pressures of practice on both sides are such that counsel most often do not sit down together early on and discuss the handling of a case. Often it is only on the day of trial, or preliminary, when all the witnesses are gathered in the courtroom, that counsel get down to deciding which witnesses are really necessary or which issues are not really in dispute.



The result is that a great many trials and preliminaries take much longer than they ought to and many members of the public are inconvenienced. Further, a tremendous burden is placed on municipalities who must pay their police officers to attend court unnecessarily. In Vancouver alone, the cost of police overtime in cases where they were not called to give evidence was \$1,200,000 for 1987.

THE MONTREAL MODEL

In the mid 1970s several experimental projects were undertaken in Canada to test the possibility of establishing pre-trial disclosure as standard practice.

In Montreal the procedure consisted of two stages: a disclosure conference between Crown and defence counsel; then a hearing before a judge. The hearing is a new step in the process, between the accused's first appearance and the Preliminary Inquiry.

What began in Montreal in 1975 as a temporary project has become a well-established feature of the criminal justice system there. The procedure has reduced most preliminary hearings to only two or three witnesses - a significant time saving. It has also increased the number of guilty pleas. Those trials that do go ahead are shorter because of the admissions that are obtained at the disclosure stage.

THE PROPOSAL

The Committee proposes Vancouver as a logical testing ground for a similar project in British Columbia.

The Provincial Court at Vancouver handles by far the largest volume of criminal cases of any Provincial Court in the Province. Few, if any, physical alterations to the building would be needed to accommodate the project. The major requirement for the success of the project is the availability of experienced prosecutors.

Because the system would be voluntary it would also require a spirit of cooperation among the judges, Crown and defence lawyers. This climate of cooperation and goodwill already exists in Vancouver. This is how the system would work.

At the first court appearance by the accused and counsel, a date would be set for a pre-trial hearing. This date should be within the next week or two and the courtroom would be called Disclosure Court.

On the day of the pre-trial hearing the defence lawyer and Crown Counsel would get together in a meeting room at the courthouse.



Crown Counsel would make sure at that time that the defence had been given all the relevant information about the Crown's case.

Once full disclosure has been made, the lawyers could discuss the possibilities open to them, from a stay of proceedings to a guilty plea, either to the charges as laid or to some lesser charges. The defence might decide to waive the Preliminary Inquiry. Or they might discuss ways to streamline the preliminary or the trial, either by admissions of fact or narrowing the issues. The witnesses who will be required at the next stage could be agreed upon.

When the discussion is concluded a clerk will take the file to the Disclosure Court and the lawyers will await their turn.

At the Disclosure Court hearing, the defence could:

- request a Preliminary Inquiry;
- waive the Preliminary Inquiry, with the consent of the Crown;
- ask for a partial Preliminary Inquiry by agreeing to waive the rest of the inquiry after one or more named witnesses have been heard;
- make certain admissions;
- enter a guilty plea;
- ask for an adjournment, either to consider a guilty plea or to complete disclosure.

If the defence asked for a Preliminary Inquiry, the judge would invite both sides to identify and limit the issues. Finally, both sides would give their estimates of how long the next stage should take, whether it be a trial or preliminary.

For this procedure to be effective, it must be taken seriously by Crown and defence counsel. Juniors and articling students must not be used for this procedure as they are for setting trial dates. Lawyers on both sides must have full authority to make admissions and to discuss the appropriate charge or charges. Lawyers' conferences should begin at 9:00 a.m. and Disclosure Court at 10:00 a.m.

It does not seem that extra judges would be needed for this experiment but that may require further review. More clerks likely would be needed however. In most courtrooms the functions of court clerk and court recorder have been merged into one job. But with



several Crown Counsel operating out of Disclosure Court at any one time, additional clerks could be needed to keep the system moving. A full-time court co-coordinator would likely be necessary as well.

Extra staff costs would be more than offset by savings in shorter Preliminary Inquiries and trials and fewer of them. Savings in police overtime and expense and inconvenience to the public should be substantial.

If successful, the experiment could be implemented in stages throughout the Province.

RECOMMENDATION 63

The pre-trial disclosure model described above should be instituted on an experimental basis at the Provincial Courthouse at 222 Main Street, Vancouver.

RECOMMENDATION 64

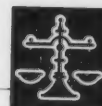
Government should make available the funding and staff necessary to make the model work.

RECOMMENDATION 65

A Committee of Provincial Court Judges, Crown Counsel and members of the defence Bar should be established to coordinate, implement and oversee the experiment for a two-year period.

RECOMMENDATION 66

This Committee should hold a series of meetings to explain the proposal to the criminal bar and to encourage full participation and cooperation.



RECOMMENDATION 67

If successful, the model should be implemented in stages, Province-wide.

RECOMMENDATION 68

The Legal Services Society must recognize the value of these pre-trial procedures by creating an appropriate Legal Aid tariff item.

THE SCOPE OF THE DUTY TO DISCLOSE

The duty of the Crown to disclose the prosecution's case to the accused has already been discussed. It has also been stated that the current policy of the Ministry of the Attorney General is to provide full disclosure to the defence, and that policy is generally followed.

Questions arise when there is disagreement over what exactly is meant by 'full disclosure'. How specific must the Crown be? Is the defence entitled to all aspects of the investigation? Or is it only entitled to those aspects relevant to the facts and matters in issue? If so, who decides what is relevant?

The Committee believes that more specific guidelines should be implemented.

It must always be remembered that the prosecution of a person charged with an offence is not a game. The burden of proof rests with the Crown. If the Crown has evidence which tends to cast doubt on any of its assertions, these must be disclosed to the defence.

RECOMMENDATION 69

The Ministry of the Attorney General should continue its policy of providing to the defence its theory or alternate theories with respect to the commission of the crime, as well as complete disclosure of the evidence which the Crown intends to call at trial.



This disclosure should include the following:

- A narrative of the facts or circumstances;
- A list of witnesses to be called except where there is an honest belief that such information could put someone's personal safety at risk;
- Witness statements;
- Statements made by the accused to people in authority;
- Statements made by the accused to others if those statements are to be used in evidence;
- All statements made by other people who are charged with offences arising out of the same circumstances, if they are relevant to the offence;
- Descriptions of any physical evidence on which the Crown intends to rely;
- Any prior criminal record of the accused;
- Criminal records of Crown witnesses, if requested by the accused;
- Copies of all books, papers and photographs which the Crown intends to produce at trial (copies of tape recordings must be made available to the accused);
- All intercepted communications where ordered by a Judge as particulars under s. 178.17 of the *Criminal Code*:³
- Search warrants in support of evidence to be used at trial and copies of the Informations of Belief sworn in support of the applications for the search warrants;
- Any authorizations on which the Crown intends to rely for the purposes of the admissibility of intercepted private communications;
- All expert reports on which the Crown intends to rely at trial and any contradictory reports that were obtained by the Crown or police during the investigation;
- If a motor vehicle accident was involved, any motor vehicle accident reports filed;
- Notice of any intention by the Crown to introduce similar fact evidence; accomplice evidence; line-up evidence; or informal out-of-court line-up identification of the accused.

3 R.S.C. 1970, c.C-34.



PRE-TRIAL MOTIONS

THE PROBLEM

In civil cases, pre-trial applications (motions) are common. There are courtrooms set aside for them every day and the forms and procedures are familiar. But in criminal cases there is no standard procedure. The *Criminal Code* refers to several applications which can be brought before trial but does not say how or when that should be done.

The result is that witnesses and jurors are often inconvenienced by having to wait around while these matters are dealt with before a trial begins. The following proposals and recommendations are made with a view to alleviating that unsatisfactory situation.

THE PROPOSAL

As was said at the beginning of this section, criminal procedure is a matter for the federal government; but s. 438 of the *Criminal Code* does give the judges of the courts of the Province certain authority to make rules of practice and procedure. The effect of this *Criminal Code* section, together with provisions of the *Provincial Court Act*, the *County Court Act*, and the *Supreme Court Act* is to give the judges the authority they need to create rules to deal with pre-trial motions.

The following applications are among those that should be brought at the pre-trial conference stage or in any event before the day of trial:

- for a severance of counts;
- to quash an indictment, charge or information;
- for a change of venue; and
- for a declaration of abuse of process, or an argument respecting delay, under the *Charter of Rights*.

The following is a draft set of rules for handling pre-trial motions which could be considered:

(1) Prior to the scheduled trial date the following motions may be brought before any Judge of the Court where the trial is to be held, whether that be in Provincial Court or in a higher court:

- (a) to sever the accused or the counts, or both;
- (b) to quash the indictment, charge or information;



- (c) to suppress evidence under the *Charter of Rights and Freedoms*;
- (d) for a change of venue; or
- (e) to suppress wiretap evidence.

(2) Any motion in this part may be heard by a court at a scheduled pre-trial hearing in accordance with s.553.1 of the *Criminal Code*.

Based on ss. 602, 603 and 604 of the *Criminal Code*, neither side has the right to appeal the result of any of these motions. The right to appeal a ruling on a motion does not arise until after the accused has been convicted or acquitted at trial.

Any motion under 1(c) would require notice pursuant to the *Constitutional Questions Act*.

Another set of rules should be created to deal with motions to suppress electronic evidence. The following draft is offered for consideration:

(1) The Crown must notify the accused and the Court, at least one month before trial, that it intends to offer as evidence communications intercepted pursuant to an Authorization.

(2) Motions to open sealed packets pursuant to s. 178.14 of the *Criminal Code* or to set aside Authorizations or renewals may be brought before a Judge of the Supreme or County Court.

(3) Motions to open sealed packets⁴ to set aside Authorizations or renewals shall be made at least seven days before trial. No such motion may be made within seven days of the trial date, unless the trial judge in his or her discretion agrees to hear it.

(4) Motions to open sealed packets or to set aside Authorizations or renewals may be heard by a Court at a pre-trial hearing or, in the case of a jury trial, in accordance with s.574(5) of the *Criminal Code*.

⁴ Sealed packets contain materials offered in support of applications for authorization to intercept private communications.



(5) After hearing the motion, the Court shall make its ruling forthwith, unless the Court in its discretion and on reasonable grounds decides to reserve its decision.

This draft rule does not provide for an appeal. It is suggested that s. 605(1) of the *Criminal Code* be amended to give the Crown the right to appeal an order setting aside an Authorization.

RECOMMENDATION 70

A committee of Judges of the Supreme and County Courts, Crown Counsel, and members of the defence bar should be established to create a set of rules for pre-trial motions in the superior courts.

RECOMMENDATION 71

A committee of Judges of the Provincial Court, Crown Counsel, and members of the defence Bar should be established to create a set of rules for pre-trial motions in the Provincial Courts.

RECOMMENDATION 72

Counsel should be encouraged to make pre-trial motions before the date set for trial, and as early as possible.

RECOMMENDATION 73

The Legal Aid tariff should be amended to compensate counsel for bringing motions prior to the trial date.



An Expanded Role for the Provincial Court

THE PROBLEM

The Provincial Court Judges told the Committee that they feel their Court could better contribute to the administration of justice if it were given an expanded role.

Part XVI of the *Criminal Code* says that in most cases, a person who is charged with an indictable offence (one of the more serious offences) can choose to have a trial before a judge without a jury. This option was once referred to as a 'speedy trial'. In British Columbia the result is a trial in the Supreme or County Court.

THE PROPOSAL

The Provincial Court Judges believe, and the Committee agrees, that in British Columbia, the Provincial Court should also be authorized to conduct these 'judge alone' trials of indictable offences.

The system of sending these cases to County or Supreme Court originated in the days when the Provincial Court Judges (then Magistrates) were not legally trained.

The term 'speedy trial' by now is a misnomer. Trials could take place much more quickly and efficiently in Provincial Court where more than 90% of all criminal cases are already being heard. The additional workload in the Provincial Court should be offset by efficiency gains if the pre-trial disclosure model is implemented.

The option of having a trial in the same Court where the Preliminary Inquiry was heard (but before a different Judge) is available in Quebec.

RECOMMENDATION 74

Section 482 of the *Criminal Code* should be expanded to include Provincial Court Judges for the purposes of judge alone trials.



RECOMMENDATION 75

Section 464 of the *Criminal Code* should be amended to allow an accused to choose trial by a Provincial Court Judge without a jury after having a Preliminary Inquiry.

RECOMMENDATION 76

The accused should still have the option of choosing a judge alone trial in a higher court.

Witnesses and Victims

WITNESSES

THE PROBLEM

Witnesses are an essential part of the criminal justice system and they deserve to be properly treated. Yet many submissions to the Committee painted a sorry picture. Witnesses often have to wait for a long time in overcrowded offices or hallways, sometimes in the presence of the accused. They are subpoenaed to court, sometimes at cost and inconvenience to themselves, only to be told that they are no longer required, or that they will have to come back another time.

The result is that these people are frustrated and angry with the justice system that treats them with so little respect. The time of police witnesses is very often wasted as well and their employers bear a very heavy cost.

THE PROPOSAL

The Committee believes that implementation of the Montreal Model described above will help to ensure that only those witnesses who are essential to the case will be called to testify. It should also reduce the number of last minute adjournments that cause witnesses so much inconvenience.

Ideally, Crown Counsel should interview witnesses well before any hearing. At that time, the nature of the case and the witness' role



should be explained carefully. The witness should be given a general understanding of what to expect in court. Unfortunately, the pressures of time mean that this does not always happen. It may be that other recommendations in this report will result in Crown Counsel having more time to spend with witnesses.

Perhaps better use could be made of their available time if a videotape presentation were used to familiarize witnesses with the criminal justice system generally: the layout of the courtroom, the functions of the various people in the courtroom, and the nature of the trial itself.

The Committee was told that witnesses who are subpoenaed to court are often confused and intimidated when they arrive at the courthouse and find no clear indication as to where they should report or what they should do. A sign at the entrance to each courthouse, offering clear instructions to witnesses would be a simple and inexpensive first step toward better communication with these important players in the justice system.

RECOMMENDATION 77

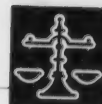
Crown Counsel should be allowed the time to meet the reasonable needs and concerns of witnesses.

RECOMMENDATION 78

Enhanced witness management and notification programs should be put in place and maintained.

RECOMMENDATION 79

The Ministry of the Attorney General should produce a videotape which can be used by Crown Counsel to familiarize witnesses with the criminal justice system and the trial process.



VICTIMS

THE PROBLEM

All of the comments made with respect to Witnesses apply as well to victims of crime. The victim will almost always be one of the witnesses for the Crown, but the victim has other concerns as well. He or she may have been injured or suffered financial loss as a result of the crime. If there has been a death, and even sometimes when there has not, the victim's family are victims of crime as well.

For most victims of crime, information about their case is their primary need. For a smaller but significant group of victims who have suffered violence and trauma, special support services are needed.

SERVICES OFFERED

Since 1981 the Ministry of the Attorney General has been addressing the various issues relating to the needs of victims and witnesses in a coordinated way. A good example is the Ministry's program for dealing with sexual abuse of children. Prosecutions are conducted by specially trained Crown Counsel who are skilled at interviewing children and the appropriate expert witnesses.

These prosecutors regularly participate in local Committees made up of professionals involved in child sexual abuse issues. In this way, prosecutors can educate social workers, doctors, psychologists, mental health workers and police. At the same time, these professionals educate the prosecutors about other aspects of child abuse.

In June 1988 the *Victims Rights and Services Act* was passed. This gives victims basic rights to information and permits judges to impose a surcharge on certain offences to provide funding for services to victims. The federal government has passed a similar law.

In the current fiscal year, \$2.15 million has been earmarked by the Provincial government for services to victims of crime and witnesses and the same amount is contemplated for the next year. These services include crisis intervention, court preparation, and emotional and practical support during the court process and referral to continuing counselling. Services are provided through police detachments, community agencies, probation and Crown Counsel offices.

About two years ago the Criminal Justice Branch of the Ministry developed a program for the submission of victim impact statements at sentencing hearings. This is the statement in which victims may express to the Court at the time of sentencing the impact that the



offender's actions have had on their lives. The federal government has followed with a similar procedure to be used across the country.

Very recently, the federal government has passed a law which gives judges the authority to order convicted criminals to make restitution to their victims. However, because most criminals do not have any money, such orders are likely to be worthless in most cases.

Also, the Committee opposes any trend toward converting the criminal justice system into a means by which individuals can pursue their claims against wrongdoers. That is what the civil justice system is for.

PROPOSAL

What is required to address the needs of victims is a broader initiative. In British Columbia, the *Criminal Injuries Compensation Act* addresses the problem in a modest way. Perhaps a federal-provincial program expanding both the coverage and the amount of compensation to victims should be considered. Some funding possibly could come from seized proceeds of crime. If society is genuinely interested in seeing that victims of crime are compensated for their losses, it must be in this fashion.

RECOMMENDATION 80

The provision of victim and witness services at police detachments, community agencies, probation and Crown Counsel offices should be continued.

RECOMMENDATION 81

The *Criminal Injuries Compensation Act* should be reviewed and consideration given to increasing the compensation available and broadening the coverage of the Act.



WIFE ASSAULT

Assaulted wives are victims of crime and so the remarks in the Chapter above apply equally to them; but their situation gives rise to its own unique problems as well.

The Crown's policy is to proceed with a criminal prosecution wherever there is evidence to support a case. As in any other type of crime, police usually lay the information (charge) rather than insisting that the wife do it. The intention of this policy is to send a message to the public that spousal assault is a crime against society, and not merely against the individual spouse.

These situations are difficult. The assaultive behaviour needs to be stopped but at the same time the family relationships have to be considered. The Crown tries to deal with these issues by proceeding with prosecution but encouraging imaginative sentencing. For example, counselling might be appropriate if the batterer is the family's main supporter and rehabilitation and reconciliation are possible.

In spite of the many policies and initiatives that have been implemented, several groups who deal with victims of wife assault across the Province expressed serious concerns that wife assault is still not being treated as a serious offence.

These groups feel that police must intervene more directly in individual cases to protect victims and arrest offenders. They applaud the Crown's spouse assault policy but say it is not applied consistently throughout the Province. They support court-ordered programs for men who assault their wives.

RECOMMENDATION 82

A strong message must be sent to the public that wife assault is as serious an offence against society as is assault of a stranger.

The Committee recognizes that efforts have been made by police and the Crown in recent years to address this serious problem and encourages continuation and enhancement of these initiatives.



Diversion

BACKGROUND

'Diversion' is the name given to programs which offer an alternative to prosecution under certain circumstances. Instead of proceeding with a criminal charge, the prosecutor refers the offender to an individual or agency who will give the offender the chance to accept personal responsibility for the offence. The offender is 'diverted' from the criminal justice system.

The diversion agency or individual makes an agreement with the offender. The terms might include making restitution to the victim or society, or to reconcile with the victim, or to participate in a counselling program or a community work program, or any combination of these or other arrangements.

Diversion is intended as a humane alternative with the potential for greater benefit to the offender, society and the victim than conviction for a criminal offence. It is only available when the Crown has enough evidence to proceed to trial. It is not used as an alternative to prosecution when the Crown does not have a case.

The typical candidate is a first-time offender. The offence is usually minor: shoplifting, mischief, minor drug offences, for example. Diversion is not available for certain offences such as impaired driving, sexual offences and prostitution-related offences. Perhaps the most important condition is that the offender must admit responsibility for his or her actions.

THE PROBLEM

The Committee heard two criticisms of diversion.

First: if the offender fails to abide by the terms of the agreement, there are no legal consequences. And second: diversion is not available throughout the Province, on the same terms.

With respect to the first point, the Attorney General's position is that when a diversion agreement is reached, the Crown gives up its right to prosecute for that offence. This holds true whether the terms of the agreement are met or not. It appears that this is not a significant problem. The manager of the Adult Diversion Program in Vancouver reports that only three out of more than 1,000 people have failed to lived up to their diversion agreements.



With respect to the second point, there is a structured, well-run diversion program operating in the Lower Mainland and Victoria. The availability of diversion programs outside of often depends on the resources and attitude of the local Crown Counsel.

On Vancouver Island, diversion is handled by various community service centres which are privatized in the sense that they are under contract to the government. These centres have diversion programs in place and are supervised by the district Corrections Office.

RECOMMENDATION 83

The diversion program now in place in British Columbia should be maintained and encouraged.

RECOMMENDATION 84

The Ministry of the Attorney General should ensure that the diversion policy is uniformly applied by Crown Counsel throughout the Province.

RECOMMENDATION 85

The Ministry of the Attorney General and the Ministry of the Solicitor General should ensure that facilities for diversion are available Province-wide.

Miscellaneous

SELECTION OF JURIES

The *Jury Act* allows the Sheriff to use whatever procedures he wishes to select jurors, as long as certain principles are kept in mind.

The procedure used in Vancouver and elsewhere is a random selection by hand from the voters' list and from other directories - often the telephone book. The result, the Committee was told, is that jury lists tend to stagnate, with the same people being called upon



repeatedly. Also, the lists do not reflect the ethnic diversity of their communities. In particular, native Indians are under-represented on jury lists.

RECOMMENDATION 86

The Ministry of the Attorney General should institute procedures, either by amendment to the *Jury Act* or by directive to the Sheriffs, that will ensure that jury panels reflect the ethnic diversity of the various communities in this Province, and that the same people are not called upon repeatedly.

NON-RETURNABLE WARRANTS

THE PROBLEM

When a warrant is issued for the arrest of a person, the 'radius of return' is specified on the warrant. This radius defines the geographic area within which the person, once found, will be returned to the place where the charge was laid.

The rationale is that the amount of money a community is willing to pay to bring back a person suspected of crime in that community, will depend on a number of factors: in particular, the seriousness of the crime. In lesser matters, a decision might well be made not to bring a person back once he has gone beyond the provincial border, or even municipal boundaries. However, when applied to more serious crimes, the effect of these policies has been to encourage fugitives to flee beyond the 'radius of return'.

For example, if a Canada-wide warrant is issued in Montreal and the person is apprehended in Vancouver, Montreal will arrange his return for trial. But if the warrant is only Province-wide, he will not be returned and Vancouver police must simply release him unless they have some reason of their own to hold him.

The result is that criminals go unpunished and the police feel that the system has failed them.



THE PROPOSAL

It has been suggested that all warrants for indictable offences be made nation-wide. The Committee agrees with the principle but feels that this is an important discretion which should be exercised by the Crown on a case-by-case basis.

RECOMMENDATION 87

The radius of return on warrants for arrest should remain in the discretion of the Crown.

However, reciprocity among provinces is to be encouraged. This subject should be addressed by the provincial Attorneys General at their next meeting.

ENFORCEMENT OF UNPAID FINES

THE PROBLEM

Failure to enforce payment of fines that are imposed by the courts or prescribed by regulation undermines respect for the administration of justice and the courts. It also deprives government of revenue.

The Committee is concerned with the perception on the part of some that court orders can be freely ignored, and with the apparent inability of the justice system to enforce the payment of court-ordered fines.

THE PROPOSAL

RECOMMENDATION 88

The Ministry of the Attorney General should give high priority to the enforcement of fines. In particular, civil enforcement procedures available under the *Offence Act* and the *Small Claim Act* should be applied more rigorously.

Consideration should be given to the acceptance of credit cards in payment of fines and to providing incentives in the form of reduction in penalty for prompt payment.



PRE-TRIAL CASE MANAGEMENT

A New Approach to Case Management

The responsibility for the pace of litigation can no longer be left entirely in the hands of lawyers and their clients. The burdens on our court system today require that the judiciary assume an active role in seeing that a case, once set for trial, proceeds as expeditiously as possible.

Procedures which have evolved over centuries to cope with the most complex disputes are unnecessarily cumbersome and overwhelmingly expensive when applied to simple, straightforward cases. As a result, justice has become beyond the reach of many.

We must develop procedures that are tailored for the different types of cases that come before the courts.

However, experience elsewhere has shown that procedures alone are ineffective. What is required is a strong commitment on the part of the Bench and Bar to reject those practices which contribute to delay, excessive cost and restricted access to the courts, and to serve the public by adopting more accessible, economical and expeditious trial procedures.

A reappraisal of the traditional roles of Bench and Bar is called for, together with attitudinal changes on the part of both in learning to cope with and implement the new reality.

Without a whole-hearted commitment from the judiciary to participate in the pre-trial management of cases, all of the new rules and procedures which are recommended in this chapter will fail to achieve their purpose. Lawyers, too, must recognize their ethical and professional responsibility to plan and prepare their cases in the most efficient way to avoid unnecessary delay and expense. Trials are a very expensive commodity, not just to the parties but to the public as



well. It is now known that cases that are not well managed at the pre-trial stage take longer at trial.¹

The one-year wait for a trial date in Vancouver is the envy of many, but it has been achieved at a cost. That cost is the level of overbooking which results in cases being unable to go ahead when scheduled because there is no judge available. Either the level of overbooking will have to increase or the time to trial will have to be continually extended unless the modern trend to longer and longer trials can be reversed.

The vast majority of cases do settle before they ever get to trial, but often not until very late in the process and at great cost. If preparation is done earlier, more cases will settle earlier, and at greater advantage to the parties.

The essence of this proposal is threefold:

- Renewed emphasis on the role of counsel in conducting cases as expeditiously as possible;
- An increased role for judges in controlling the pace of litigation; and
- A set of procedural tools that are tailored to the nature of the case, whether it be a large complex case, perhaps with numerous parties; a simple, straightforward dispute; or something in the middle.

This chapter is devoted to a discussion of pre-trial case management generally. Individual case management topics are discussed more fully in the next chapter.

TRIAL SCHEDULING

There are essentially two different ways in which cases can be set for trial - the assize system and the fixed date system.

An assize is a sitting of the court which may last a few days or several weeks. A case is assigned to a particular assize and is placed on the list for that assize. Trials are heard in the order they appear on the list. Some cases on the list may settle at the last minute or be adjourned, so counsel and parties and witnesses for all cases on that list must be available for trial at any time throughout the duration of

¹ D.A. Sipes, *et al.*, *On Trial* (Williamsburg: National Center for State Courts, 1988.)



the assize. If there are cases that cannot be heard at that assize they will be put on the list for the next assize, or the next available assize.

This system is used in Ontario and in British Columbia outside of Vancouver and Victoria for scheduling civil trials. The increasing volume of litigation in British Columbia has resulted in cases being bumped from one assize to another, causing great inconvenience and added expense to witnesses and litigants.

The second method for scheduling trials, which is the method in effect in Vancouver and Victoria, is the fixed date system. Here, the litigants are assigned to a specific date for trial. Again, the volume of litigation combined with the policy of setting trials within one year of close of pleadings has resulted in high levels of overbooking. Despite the fallout rate due to settlements and adjournments, many trials have not been able to proceed on the date set.

Those are the two methods of trial scheduling. There are also two methods of determining at what point in the litigation a party is entitled to set a matter down for trial, whether it be on an assize list or for a fixed date.

Under the system in place in Ontario and Manitoba, for example, a case can be set on the trial list only after the major steps in preparation for trial have been completed: notably examinations for discovery. The time to trial under this method should be quite short because the parties must certify that they are ready for trial in order to be put on the list.

The British Columbia system allows parties to apply for a trial date as soon as pleadings are closed. The intention is that a firm trial date, probably a year in the future, will impart a sense of urgency to the proceedings and give parties and counsel a date to work toward. Trial preparation takes place after the case is set for trial.

The challenge for those responsible for trial scheduling is to balance two competing interests: that of keeping the time-to-trial period at no more than a year; and at the same time offering firm trial dates. If all trial dates were guaranteed there would be a great deal of down time in the courts because of the high settlement rate. This inefficiency would mean that trial dates would have to be pushed farther and farther into the future. On the other hand, if trials continue to increase in number and in length, the policy of assigning a trial date within a year means that more and more cases will be unable to go ahead as scheduled.



The rationale for the present trial scheduling policy was set forth by McEachern CJSC (now CJBC) in a letter to the Advocate on June 27, 1988. He began by describing the trend that developed in the early part of this decade, towards more litigation and longer and longer trials. More judges were added to the court and the Chief Justice implemented a number of devices such as pre-trial conferences and summary trials, in the interests of efficiency. In spite of these efforts, he said:

(T)he waiting period between trial setting and trial date reached 2 years in late 1984. . . . Clients lost interest in litigation, parties and witnesses died or disappeared, adjournments caused undue hardship and it was apparent that, unless something drastic was done, the waiting period would progress further and further into the future and the trial process would lose both relevance and credibility.

It was accordingly decided, when there appeared to be no alternative, to end discretionary overbooking and to attempt to bring the waiting period down to one year in stages over a two year period. It was and is still believed that the pain of increased overbooking could be compensated by a reduced waiting period. . . .

This program, which began January 1st, 1985, meant that the Trial Division would no longer attempt to determine how many cases could be heard on a particular date in the future. After all, that was the system that produced a two year delay. Instead, all Trial Records presented to the Registry were given a trial date without there being any assurance that there would always be a judge to hear every case on the trial date. . . .²

The system worked well until the latter part of 1986 when it became much more common for cases to be bumped from the trial list.

The other cost of the efficient management of the Vancouver trial list has been the impact on other parts of the Province.

There, as noted previously, cases are still set on an assize basis. Very often cases are 'bumped' from one assize to the next, repeatedly over the course of many months. Because assizes are only one week long, any trial which is expected to take longer than three days must

² A. McEachern, 'Observations on Some of the Submissions to the Justice Reform Committee' (1988) 46 Advocate 525.



wait for a 'special sitting'. In some parts of the Province the wait may be as long as two years or more.

The Committee agrees that it is in the public interest that the system continue to make trial dates available within one year of setting a case down for trial. However, later dates should also be available, at the option of counsel who sets the case for trial.

It is to the reform of litigation practice and procedures that the Committee's case management recommendations are directed. These, together with other recommendations in this report will, we expect, make it possible to continue to offer trials dates within a year without excessive overbooking of the trial list.

Combating Expense and Delay

The problems of trial scheduling only tell part of the story. The 'year-to-trial' begins when the case is actually set down on the trial list. Much of that period may be spent in expensive, but necessary, discovery procedures and pre-trial applications all of which can continue almost to the trial date.

The Committee was moved by the stories told by people who felt victimized by a system over which they had no control. They had become involved in a lawsuit without any clear idea of what it would cost, in time or money, and found themselves enmeshed in examinations for discovery and Chambers motions that seem never to end or to produce tangible results. For some of these cases, the system seems to have been over-designed.

As noted in an editorial in the Advocate in 1986:

Cases with the most simple issues can still be subjected to Interrogatories, Examinations for Discovery, Commission Evidence, Motions to Examine Witnesses, claims of privilege and so on, when in truth, in the vast majority of cases uncomplicated issues could be justly adjudicated by counsel simply calling witnesses to prove the facts and assisting the judge with the appropriate submissions on the law.

All cases call out for some degree of management to ensure that the proceedings move in a timely and expeditious manner. On the other hand, there is a very legitimate concern that there may be too great an involvement by judges in the management of a case.



Our system of justice is built on an adversarial model that has evolved over centuries: each side puts its case, in the best light possible, before a neutral third party who arrives at a decision based on the evidence that is presented.

Some feel that the introduction of judicial case management conflicts with this adversarial model and will detract from the quality of justice. 'Managerial judging' is the subject of great debate, especially in the United States where it has become the norm in many places. Critics say that managerial judging gives trial courts more authority and at the same time provides litigants with fewer safeguards against abuse of that authority.

Their principal concerns are:

- the private nature of most pre-trial supervision: pre-trial conferences are often conducted in a judge's chambers in private and off the record;
- that in attempting to resolve discovery disputes judges can assume the role of mediator or negotiator; and
- that supervision of discovery can become an avenue for judicial control over all phases of the litigation.

The Committee recognizes the bases for these fears and has addressed them in the rules that are being proposed.

Critics also question whether judicial management does in fact save time and expense. Moreover, judicial management has its own costs. Time spent in pre-trial conferences is not available for trials. Since most cases do settle before trial in any event, much time may be devoted to cases that would have settled anyway. Finally, there is the possibility that judicial management may result in case processing becoming an end in itself, rather than the means of achieving justice.

While it is difficult to prove that the critics are not correct in their assessment of the value of judicial management, a recent study of three different court systems in the United States concluded that lack of pre-trial judicial management leads to longer trials. Both parties begin the trial with false hopes and the trial is burdened with many issues which should have been resolved.³

³ Sipes, *supra*, note 1.



The Limits of Judicial Case-Management

Judges must be alert to the danger that, in advancing the goals of administrative efficiency they do not jeopardize the quality of justice in their courts. There are certain factors which should be kept in mind in the development of case-management procedures:

- Counsel are usually in the best position to know what should be done to present their cases in the most persuasive and legally sound way.
- Once a case is set on the trial list, its rate of progress affects all other disputes waiting to be resolved. During this period therefore, counsel must give up some of their traditional autonomy over management of the case and share that responsibility with the court in the interests of the most expeditious processing of all litigation.
- Judges are usually not in a position to decide what preparation is necessary, what witnesses should be called or what evidence is required. Judges should not assume the responsibility of counsel.
- Judges do not have a role to play in the management of a case until pleadings are closed. Avoidable delay during that period is the responsibility of the lawyer.
- Judges should intervene in cases to the least extent possible and judicial intervention should be limited to that area in which judges and counsel share responsibility: the processing of a case through the court from the time a trial date is allocated.

The Proposal

Modern reform of trial practice has generally been accomplished by changing the Rules of Court and by referring the management of cases to Pre-Trial judges. The Committee recommends both approaches.

AUTHORITY OF THE PRE-TRIAL JUDGE & SUMMARY TRIAL JUDGE

Rule 35 of the Supreme Court Rules sets out the procedure for requesting a pre-trial conference, the agenda of items to be considered, and the orders that the judge may make.

Rule 18A provides for an application to court for judgment on affidavit evidence, rather than going to trial. If the court does not



grant judgment, there are certain directions that it can give for the more expeditious conduct of the trial.

Submissions to the Committee have suggested that these Rules unduly limit the authority of the judge conducting a pre-trial conference or a Summary Trial.

The Judges of the Supreme Court have recommended, among other changes, a new Rule 41A which would give broad powers to a judge at any stage of a proceeding. The Committee recognizes the purpose of this proposal. If the court is to assume responsibility - together with counsel - for the management of litigation, the rules must provide the power necessary to carry out that responsibility effectively.

However, various sections of the Bar have expressed concern that this proposed rule would allow the Court to intrude too far into that aspect of trial preparation which is properly the responsibility of counsel and would encroach upon the duty that counsel owes to a client.

The Committee appreciates the Bar's concerns and therefore recommends that a new Rule 41A be adopted but that it be restricted to applications under Supreme Court Rule 18A (the Summary Trial Rule) and to Pre-Trial Orders made under Supreme Court Rule 35(4).⁴

In keeping with the principles discussed elsewhere in this report of systematic review of procedural changes, the application and possible expansion of these rules should be monitored over the next three years. Adjustments to the rules should be made as experience is gained with their operation.

RECOMMENDATION 89

The powers available to a Judge on a Summary Trial (Rule 18A), when the court is unable to grant judgment should be broadened to include all those powers included in the proposed rule 41A.

To implement this recommendation, Rule 18A(5) should be deleted and replaced with a rule to this effect:

(5) When the court is unable to grant judgment pursuant to subrule (3) and considers that the proceeding ought to be expedited, the court may, with or without an application, make an order provided for in Rule 41A.

⁴ The rule recommended by the committee differs in some respects from that proposed by the Judges of the Supreme Court.



RECOMMENDATION 90

The powers available to a Judge on a Pre-Trial Conference (Rule 35) should be broadened to include all those powers included in the proposed Rule 41A.

To implement this recommendation, Rule 35(4) should be deleted and replaced with a rule to this effect:

(4) At the pre-trial conference the judge may, with or without an application, make an order provided for in Rule 41A, and on making an order under this subrule, the judge may give such other additional directions as he thinks just.

RECOMMENDATION 91

A new rule, Rule 41A, should be adopted which would give a judge, whether on a Rule 18A application or on a Pre-Trial Conference, certain powers which are aimed at the more efficient pre-trial management of cases.

The terms of the proposed rule 41A are as follows:

- (1) A judge may, on a Rule 18A application or on a Pre-Trial Conference, make one or more of the following orders:
- a) the pleadings be amended or closed within a fixed time;
 - b) interlocutory applications be brought within a fixed time;
 - c) a general application for directions be brought within a fixed time;
 - d) procedures for discovery to be completed within a fixed time;
 - e) the trial or part of it will be heard by the court without a jury upon any of the grounds set out in Rule 39(20) and Rule 35;
 - f) with the approval of the Chief Justice, the proceeding be set for trial on a particular date or on a particular trial list;
 - g) a party file and deliver within a fixed time, to each party adverse in interest, an Affidavit of Documents;
 - h) an expert opinion be delivered to opposing parties within such time as the judge considers appropriate, and that the response to the expert opinion be filed within such further time as the judge considers appropriate;



- i) experts retained by the parties meet on a without prejudice basis to determine those areas on which they are in agreement and to isolate those issues which are in dispute; [new]
- j) a Statement of Agreed Facts be filed within a fixed time; [new] and
- k) a discovery conference be held following which the judge may make a direction establishing a plan and schedule for discovery and determining such other matters as are necessary for the proper management of discovery in the action, including the allocation of expenses. Such an order may be varied or amended whenever the judge considers it appropriate to do so. [new]

Only those subrules marked [new] represent powers that judges do not now have.⁵

PROPOSED CASE MANAGEMENT SYSTEM

The Committee, for the purpose of discussing case management, has divided litigation into three categories.⁶

Long trials: Cases that require more than 15 days of trial time are generally complex litigation involving multiple parties and complex issues. Sometimes these trials can last many months. For a long trial, a trial date should be available within 12 to 18 months from the date it is set for trial.

Medium trials: Cases that require from six to 15 days of trial time usually involve fewer parties and fewer major issues than the longer cases. A trial date should be available for these cases within nine to 12 months.

Short trials: Most cases require no more than five days of trial. For these cases a trial should be available within nine months of setting down for trial.

The Committee considers each of these trial categories requires case management techniques designed to maintain the appropriate pace of preparation for such litigation, keeping in mind the objective of economical, expeditious justice.

The basic principle is that for long, complex cases, trial preparation *must* be completed well in advance of trial. A significant block of courtroom time has been reserved for such a case and it is

⁵ Certain subsections of 18A(5) have not been incorporated into the proposed Rule 41A: (e), (g), (h), (i), (j), (k) and (l).

⁶ Cases involving claims for \$20,000 or less are dealt with separately in the chapter titled: Economical Litigation Program.



important to those responsible for trial scheduling to know well in advance if the trial is not going to be ready to proceed as scheduled.

However, trial preparation is expensive, especially if expert reports are needed. Shorter cases often involve smaller sums of money and it would be unfair to require the parties to incur the total cost of trial preparation so far in advance of trial. They should be allowed to continue their efforts at settlement until closer to the date set for trial. If their negotiations are successful they may avoid some of the expense of trial preparation and expert reports.

The Committee has separated litigation into these three categories as a means of balancing these two competing interests: on the one hand the parties' interest in not incurring expense before it is required; and on the other, the public's interest in having cases prepared well in advance for the better administration of the courts.

The mechanism for achieving this balance is the Flag Rule.

THE 'FLAG RULE'

The system of setting cases down for trial only after all pre-trial procedures are complete has been discussed under Trial Scheduling. As mentioned there, that is the system in place in Ontario and elsewhere.

Counsel prefer the British Columbia system where they can reserve a trial date in every case at the time the pleadings are closed. The trial date will be a year away, during which time they will prepare the case for trial. However, this system has resulted in the trial list being overbooked with trial date reservations, many of which become "no-shows". Cases settle or are adjourned for a multitude of reasons.

The Flag Rule is an innovative procedure designed to achieve the best of both systems: a fixed trial date assigned when pleadings are closed and yet a clearing of the list a certain period before the trial date of those cases which are not going to proceed.

It is a simple procedure: a given time before trial (depending on whether it is a long, medium or short trial), the parties must file a certificate confirming their estimate of trial time and certifying that they have completed certain pre-trial procedures. If not, the trial will be removed from the list. The Committee recognizes that it is not always in every party's interest to ensure that a trial goes ahead as scheduled and so the rule allows for a judge to order that a case be



left on the list in spite of the fact that one or more parties may not have filed their Certificate of Readiness.

However, there should be consequences for failure to file the Certificate which do not require the other party to apply for an order of the Court. Therefore, the rule should also provide that anyone who fails to file a Certificate loses the right to conduct any further discoveries, deliver any further interrogatories, or bring any further interlocutory applications without leave of the Court or consent of the party who has filed.

It is hoped that those counsel who have made a practice of settling their cases on the courthouse steps will come to regard the Flag day in the same way they now regard the first day of trial and will seriously consider settlement when it becomes necessary to file their Certificate of Readiness.

RECOMMENDATION 92

The Committee recommends adoption of a 'Flag Rule' which would require parties to file a Certificate of Readiness at a fixed time before trial. For long cases that time would be 90 days before trial; for medium cases, 60 days; and for shorter cases, 30 days.

The rule would provide as follows:

- (1) Each party shall file with the Registrar a Certificate of Readiness in Form "X" confirming that the party is ready to proceed on that date, and confirming the estimated duration of trial, and certifying that he has:
 - a) filed and delivered an affidavit verifying his list of documents in accordance with Rule 26(16);⁷
 - b) filed and delivered a Notice to Admit in accordance with Rule 31(1), and received a satisfactory answer;⁸
 - c) delivered statements of all expert witnesses whose evidence he will adduce at trial in accordance with the *Evidence Act*; and
 - d) completed his examination for discovery of all opposite parties he wished to examine.
- (2) The Certificate of Readiness shall be filed:
 - a) in the case of trials that are set for more than 15 days, no later than 90 days before trial;

⁷ See: 'Discovery of Documents' below

⁸ See: 'Admissions and Statements of Agreed Facts' below



- b) in the case of trials that are set for six to 15 days, no later than 60 days before trial; and
- c) in the case of trials set for no more than five days, no later than 30 days before trial.

(3) A party who files a Certificate of Readiness in accordance with this rule shall serve a copy on every other party to the action.

(4) If any party fails to file a Certificate of Readiness as required by this rule, the proceeding shall be removed from the trial list unless a judge orders otherwise.

(5) A party who fails to file a Certificate of Readiness as required by this rule may not take any further interlocutory applications, conduct discoveries or deliver interrogatories unless by consent of every party who has filed, or by leave of the Court.

A critical aspect of this system is that counsel should determine, at the time of setting the case for trial, how long it will take to prepare the case. Some cases do take longer than a year to properly prepare for trial. The present system is that when a case is set for trial a date will be given within a year, or for some types of cases, within months. That is, anyone who applies in May 1988 for a trial date is assigned a date in May 1989. If they want a date in September 1989 they will usually be told that the list for that month is not open and those dates are not available.

In order for the Flag Rule to operate fairly and efficiently this procedure should be altered to give counsel setting the trial the option of a later date.

FURTHER PREPARATION FOR TRIAL

After the date for filing the Certificate of Readiness has passed, there are further steps to be taken in preparing any case for trial. The Committee believes that obtaining admissions is a vitally important step in that process and in every case a Statement of Agreed Facts should be required 30 days before trial. The subject is discussed in more detail below.⁹

⁹ See: 'Admissions and Statements of Agreed Facts' below



The parties should prepare and file at the beginning of trial, in all cases:

- a brief Memorandum of Issues of Law, with supporting authorities;
- a common book (or set of books) containing all documents which are to be used as evidence, in chronological order; and
- a common book of authorities, containing only the headnote of each case and the passages to which counsel will refer, unless counsel requires the entire case for the court's reference.

LONG TRIALS (COMPLEX LITIGATION)

Besides the earlier date for filing the Certificate of Readiness, the only special requirement for cases which are estimated to take longer than 15 days at trial is this: The parties must file a Case Management Program.

The Case Management Program is a plan and a timetable for the preparation of the case. In most cases counsel will be able to agree on a program. If for any reason they cannot agree, a pre-trial judge may be asked to give directions. The program can be varied, by agreement, as the case progresses, and either party can apply to enforce its terms as needed.

RECOMMENDATION 93

In cases which are estimated to require more than 15 days of trial time, the parties should be required to file an agreed Case Management Program within 30 days of the close of pleadings. A trial date would not be allocated in any case estimated to last for more than 15 days until a Case Management Program has been filed.

The Committee recommends the following procedures for long cases:

- Parties file an agreed Case Management Program within 30 days of close of pleadings, fixing dates by which the various interlocutory procedures will be completed.
- Failure to file an agreed Case Management Program will result in counsel being referred to a pre-trial judge to settle the Case Management Program.



- Counsel may, at any stage of the proceeding, request a Case Management Conference.
- When the agreed Case Management Program is filed, a trial date will be allocated to accord with the program. Generally, a date will be fixed within one year of the filing of the Case Management Program although where appropriate, that period may be longer.
- The following interlocutory proceedings shall be completed 90 days before the trial date (that is, the date of operation of the 'Flag Rule'):
 - further joinder of parties;
 - amendment of pleadings;
 - third party proceedings;
 - discovery of documents;
 - interrogatories;
 - examinations for discovery;
 - exchange of expert reports;
 - references to special referees or others;
 - filing of Scott Schedules;
 - expert witness conference;
 - admissions of fact and documents;
 - consideration of settlement conference; and
 - mini-trial.

AGREED CASE MANAGEMENT PROGRAM

It may be helpful to set out the usual components of an agreed Case Management Program in complex litigation. It is recognized of course that each case has its unique aspects. Procedures that are necessary in the preparation of one case may be inappropriate and unnecessary in another. Counsel designing a timetable for preparation of a case will take many factors into consideration: the procedures that are appropriate to the particular case; the calendars of all counsel; and the availability of clients, witnesses, experts and support staff.

By consultation with those interested persons as well as opposing counsel, an agreed calendar of events can be created which is best suited to the needs of counsel and clients and yet ensure that the case will be ready for trial 90 days before the trial date. The possibility of costly adjournments or a lost trial date will be greatly reduced.



The following is a check list of possible steps to be considered in the preparation of an agreed Case Management Program:

- a) What, if any, amendments to the pleadings or demand for particulars are contemplated; what other parties, if any, may be joined; what other motions are anticipated; and the date by which pleadings will be closed;
- b) Discovery and production of documents by the parties and preparation of an agreement as to the admissibility of documents;
- c) Delivery and response to interrogatories of the parties including interrogatories of experts after exchange of expert reports, if appropriate;
- d) Examinations for Discovery of the parties;
- e) Notice to Admit Facts and Documents and delivery of responses to these notices; and filing by plaintiff's counsel of a Statement of Admitted Facts;
- f) Exchange of expert reports, if any; consideration of the use of a neutral expert; and convening a conference of all experts of all parties;
- g) Preparation and delivery of a Scott Schedule, if appropriate;
- h) Trial of separate issues before or after the main trial including a possible reference of issues to a Special Referee;
- i) The appointment of an Assessor, if appropriate;
- j) Contemplated pre-trial motions, if any, including the possibility of holding a mini-trial;
- k) Review of estimated length of trial, considering witnesses to be called by each party;
- l) Necessity of one or more pre-trial case management conferences;
- m) Format to explore early settlement possibilities, including potential for a Settlement Conference;
- n) Filing a Statement of Agreed Facts and Issues;
- o) Preparation and filing of memorandum of issues of fact and law; and
- p) Other matters.



PRE-TRIAL JUDGE AS TRIAL JUDGE

The more extensive pre-trial case-management required of a pre-trial judge may create a perception among one or more of the litigants of a lack of the desired degree of judicial objectivity. Therefore the Committee recommends that a judge should not hear the trial of a case in which he or she has been extensively involved as pre-trial judge, unless all counsel agree.

RECOMMENDATION 94

There should be an amendment to the Rules to provide that a judge who has been extensively involved in the pre-trial management of litigation will not take the trial, unless all counsel file in the Registry a common request to that effect .

SETTLEMENT ISSUES AT THE CASE MANAGEMENT CONFERENCE

The primary purpose of a case management conference is not to settle the case but to prepare the case for trial in the most efficient and cost-effective way. In this respect it differs from a settlement conference, the sole purpose of which is to finally resolve the dispute.

British Columbia judges have generally taken the approach that was described by Anglin J.:¹⁰

It is always the duty of the Judge, in the interest of the public, as well as in that of the parties, to encourage the settlement of actions. But it should be assumed that counsel . . . have done their duty in endeavouring to effect settlement. Little good is done by attempting to drag on counsel and clients into arrangements of which they do not approve.

The pre-trial judge should ask counsel whether they wish any assistance in negotiating a settlement. If counsel wish the case to be set down for a Settlement Conference¹¹ arrangements can be made for a conference before the pre-trial judge or another member of the court.

¹⁰ Anglin, J, 'Relations of Bench and Bar' (1909) 29 Canadian Law Times 1 at 7.

¹¹ See: 'Settlement Conferences and Mini-Trials' below.



OPENNESS AND REVIEWABILITY

Case management conferences should normally be held in open court or in a conference room to which the parties have access. They should not be held in the judge's personal chambers.

The relative informality of a meeting in a judge's chambers may encourage greater laxity and indifference by counsel to the directions given. A more formal setting may promote a higher standard of preparation and presentation. Moreover, litigants who are excluded from meetings where decisions vital to their interests are being considered are generally disappointed and bewildered. Accordingly, clients should be excluded from case management conferences only in exceptional circumstances when all counsel agree it is in the interest of all their clients.

A court clerk should be present to record the main items discussed at the conference and the directions given.

Since the pre-trial judge is to have authority to make enforceable decisions that could affect the outcome of the case and the rights of the parties, those decisions should be reviewable in the same way as all other interlocutory orders.

MODERN TECHNOLOGY

Innovative use of modern technology may assist in reducing the costs associated with case management conferences. When counsel reside in different communities, telephone conference calls and faxing of documents may avoid the necessity of out-of-town attendances.

Counsel should not be reluctant to propose to the court any procedure which will save cost or time and advance the early preparation of a case for trial.

IMPLEMENTATION

As stated at the beginning of this chapter, the successful implementation of these new rules will depend heavily on a strong commitment by Bench and Bar alike.

The role of the judge in case management should be included in the syllabus of the new national judges' school located at the University of Ottawa. There is considerable research being done in this field throughout North America and there will be much more: the judges'



centre should establish a clearing house for literature on this subject as much of it cuts across provincial and even national boundaries.

The support of the Professional Legal Training Course and the Continuing Legal Education Society should be enlisted. Their courses will no doubt offer information about whatever new rules are enacted but they should also place a renewed emphasis on the ethical and professional duties of counsel to prepare and conduct their cases economically and expeditiously.

The participation of the Canadian Bar Association Subsections, the Trial Lawyers Association and the Inns of Court program could create a new spirit of co-operation that will only enhance the adversarial process.

When all the irrelevancies are put aside, everyone's energies and resources can be focused on the real issues. Cases that have the potential for settlement can settle earlier rather than later and those that must have their day in court will be honed to a fine edge by the time they arrive at the courthouse steps. Unnecessary delay and costs will be avoided and the justice system will become more relevant and accessible to the public.



SELECTED TOPICS IN CASE MANAGEMENT

ADJOURNMENTS

Adjournments should be granted only when the ends of justice require and not generally for the convenience of counsel or the parties.

The Committee heard many complaints from lawyers and lay people that adjournments are granted too readily in courts at every level. Adjournments wreak havoc with trial lists and inconvenience many people. Each time a trial is adjourned the risk is increased that witnesses or evidence will not be available or that memories will have faded further.

When adjournments are granted during the course of a trial, research shows that the total time taken at trial is increased.¹

RECOMMENDATION 95

The granting of adjournments is always at the discretion of the judge. However, because they contribute to cost and delay in litigation, they should be granted only when justice requires.

During the next three years, statistical information as to the numbers of adjournments, when they occur, and the reasons for them should be gathered and analyzed.

¹ D.A. Sipes, *et al. On Trial*, (Williamsburg: National Center for State Courts, 1988).



ADMISSIONS & STATEMENTS OF AGREED FACT

THE PROBLEM

The failure to make admissions is one of the greatest contributors to the over-use of trial time. Most cases involve very few real issues. By far the majority of facts and documents in any case are not seriously in dispute. Yet hours and days of trial time are consumed as counsel painstakingly prove every element of every issue - at great cost to their clients and to the public.

There is no reason for trial time to be taken up with matters that can and should be agreed to by the parties.

After Notices to Admit have been exchanged, Examinations for Discovery held, and Discovery of Documents and Interrogatories completed, the vast majority of the relevant facts in most trials can be admitted. But counsel commonly fail to direct their attention to seeking agreement and admissions from the other side. Their focus is on denial and contention. The standard statement in defence pleadings is that 'anything that is not expressly admitted is hereby denied'. Even when a fact is admitted, counsel frequently call evidence on the point. Nor do judges normally require counsel to make appropriate admissions and file Statements of Agreed Facts.

SUMMARY OF THE PROPOSAL

Those responsible for litigation must focus their efforts and attention on the real issues and the evidence that the case requires.

Developing a talent for weeding out the matters not in dispute and applying it to preparation for trial, examination and cross-examination of witness, and presentation of argument, should be a primary goal of good counsel and the courts; for students and their principals; and for the Professional Legal Training Course and Continuing Legal Education.

The task of the courts is to require counsel to identify the issues really in dispute and confine their efforts to those.

Some members of the Bar have opposed the adoption of rules which add another step in the litigation process - such as requiring Notices to Admit Facts. The Committee recognizes the concern for what may be seen as an added cost item, but takes a different view. It is very much more expensive to prove a fact at trial than it is to prove it by an admission obtained in response to a Notice to Admit.



ADMISSIONS

Supreme Court Rule 31 now provides:

Notice to Admit

(1) By delivery of a notice to admit in Form 21, a party may request any other party to admit, for the purposes of a proceeding only, the truth of a fact or the authenticity of a document specified in the notice.

The effect of subrule 31(2) is that unless the party receiving the notice denies the truth of the facts or the authenticity of the documents and states reasons why they cannot be admitted, the facts will be deemed to be admitted.

The Supreme Court Judges and several Bar groups favour mandatory Notices to Admit.

The Committee agrees with this approach. More and better use of Notices to Admit will shorten trial times and also increase the potential for settlement. However, while the Committee recognizes the benefit of the early admission of facts in reducing the extent of interrogatories and examinations for discovery and facilitating preparation for trial, it appreciates that in many cases it is only after discovery and the exchange of expert reports that the parties are in a position to make comprehensive admissions which will substantially reduce trial time.

In summary, the Notice to Admit serves two purposes:

- to reduce the cost and work involved in preparation for trial and
- to reduce the cost and duration of the trial itself.

The benefit of obtaining more than one set of admissions is self-evident.

Accordingly, the Committee would vary the recommendation of the Supreme Court Judges.

RECOMMENDATION 96

Notices to Admit Facts should be mandatory in every case.



Rule 31(1) should be amended as follows:

(1) Before the date fixed for the filing of the Certificate of Readiness, each party shall deliver one or more Notices to every other party adverse in interest requiring the admission of the truth of specific facts for the purposes of the proceeding only, and the admission of the authenticity of the specified documents he reasonably expects to adduce at trial.

This rule would apply to all cases except those proceeding by way of the Economical Litigation Program.

STATEMENTS OF AGREED FACT

Admissions that are obtained in Examinations for Discovery, Interrogatories, Notices to Admit and in any other way should be set forth in a joint Statement of Agreed Facts. If agreement cannot be reached, a Statement of Agreed Facts as the party filing the Statement perceives them to be should be filed and delivered to the opposing parties before trial.

All facts contained in Statement of Agreed Facts will be deemed to be agreed upon unless the party receiving the Statement disputes it within 14 days, in the same manner as is now provided for Notices to Admit.

The judge and counsel then have a clear picture of those items which will not need to be proven at trial.

A requirement that such a statement be filed in every case (except Economical Litigation cases which have their own procedure) should not cause hardship. If counsel does not know what is to be admitted, a great deal of preparation and trial time can be wasted.

In simple cases, the Statement may be very simple. If it requires a meeting between counsel this may be an opportunity for settlement negotiations as well, or at least for discussions that can benefit the course of the trial.



RECOMMENDATION 97

There should be a new Rule requiring counsel in all cases (except Economical Litigation Program cases) to file a Statement of Agreed Facts no later than 30 days after the filing of the Certificate of Readiness. In short trials, this means the statement will be filed on the day of trial. If agreement cannot be reached, each counsel should file a Statement of Agreed Facts as he perceives them to be.

The penalty for failing to do so could be possible imposition of an award of costs payable in such sum as the trial judge considers appropriate.

RECOMMENDATION 98

Continuing Legal Education and Professional Legal Training Course should emphasize in their programs the importance to good advocacy of obtaining admissions and agreeing to that which is not in issue.

Desk Orders

THE PROBLEM

There is a procedure in place which allows for interlocutory applications, which are consented to, to be made by way of Desk Order. The Motion with supporting affidavit material and a draft of the Order requested is filed with the court but no one needs to attend before a judge to speak to it. If everything is in order, the Registrar will sign the order. If the Registrar has any doubts, the file goes before a judge.

The procedure is much quicker and less costly than a Chambers appearance. Unfortunately it is not as widely used as it might be. On any given day in Vancouver Chambers there are a number of applications which could have been granted by Desk Order.

The range of applications which can be handled by Desk Order varies from Registry to Registry. It is the broadest in Vancouver



where volume is highest. Other Registries do not feel the same pressure and so have more narrowly defined the range.

The difficulty is that without an official list, no one can be certain what can and cannot go by way of Desk Order.

THE PROPOSAL

A Practice Directive should be issued listing all those applications which can be granted by way of Desk Order: that is, without the necessity of a court appearance.

The matters that now are processed as desk orders in Vancouver include:

- dismissing actions by consent;
- payments out of court by consent;
- amendments to style of proceedings by consent;
- consent infant settlements under \$10,000 (the Public Trustee must also consent);
- transfers from the Supreme Court to County Court by consent;
- posting security and discharging liens;
- obtaining police records in motor vehicle accidents;
- setting aside default judgments by consent;
- discharge of receivers by consent;
- setting aside garnishing orders and payments out of court by consent;
- applications to try two actions at the same time by consent.

Some foreclosure matters can be done by way of Desk Order if all parties consent: orders absolute, orders for sale on the usual terms, orders approving sale, and extending the redemption period.

Consent orders that must be approved by a judge include custody, access and maintenance orders and a direction that two actions be tried at the same time.

Orders that must be spoken to include restraining orders, substitutional service, requests for clinical records, slip rule applications, a direction for a trial of a proceeding commenced by way of petition.



RECOMMENDATION 99

A Practice Directive should be issued listing the applications that can be made by Desk Order. Consideration should be given to extending the list to include as many other matters as may be appropriate.

Discovery of Documents

THE PROBLEM

Almost every lawsuit involves some documents. Under our current system, each party may serve on any other party a Demand for Discovery of Documents. Anyone who receives such a Demand is required, within 21 days, to supply the other with a list of relevant documents.

Previously, disclosure had to be made in affidavit form. That requirement was changed in the interests of efficiency but the Committee believes it is time to go back to the Affidavit of Documents. The List of Documents has become a rather casual document for which the client feels no particular responsibility.

THE PROPOSAL

Each party to a lawsuit should be compelled to disclose all relevant documents to the other side automatically, without the need for a Demand. That disclosure should be in the form of an affidavit sworn by the party, not simply an unsworn list prepared by counsel.

RECOMMENDATION 100

A Demand for Discovery of Documents should no longer be required. Every party to an action should be required to file and deliver to each opposing party an Affidavit of Documents within a fixed time.

Rule 26 should be amended to say that unless a judge orders otherwise, each party shall file and deliver to each party adverse in



interest, an Affidavit of Documents. Plaintiffs should be required to do so within 45 days of service of the Statement of Claim and defendants within 30 days of service of the Statement of Defense unless a judge orders otherwise. Proposed Rule 41A includes the authority for a pre-trial judge to order the parties to file and deliver within a fixed time an Affidavit of Documents.

The form of the Affidavit can be a problem when the party is a large corporation and no single person could have knowledge of all relevant documents.

In that case, the person swearing the affidavit for the corporation should state that he has caused a diligent search to be made of all the documents that are or have been in the possession or control of the company and that he has been informed and verily believes the truth of what is stated.

The Committee heard submissions that the Affidavit should list the author, recipient, date, document type and subject of each document.

Although this would be desirable in most cases, it could impose too heavy a burden on others. The Committee merely recommends that counsel adopt this practice where practicable.

Examination for Discovery

THE PROBLEM

It has been said that discovery abuse takes two forms: that which is too deep and that which is too broad. Discovery goes too deep when it covers ground that has already been covered. Discovery is too broad when it goes beyond the scope of what is relevant to the issues raised by the pleadings. But it can also mean harassment, either in the questions that are put to a person or the way in which they are framed. Presentation of a client who is uninformed and ill prepared to answer questions is another form of abuse of the discovery process.

Much has been said and written about abuse of the discovery process. The Committee heard from litigants who were appalled at the extent of the discovery they were subjected to. Some lawyers said that abuse is primarily limited to large cases with a great deal of money at stake. It is possible for a wealthier party to put another to extreme financial disadvantage by extending Examinations for Discovery unduly.



The Canadian Bar Association told the Committee that in smaller cases, where counsel must be keenly aware of their clients' budgets, abuse is rare.

There are many possible causes of discovery abuse, including:²

- There are tactical advantages to using discovery to harass and delay. 'Pushing' (excessive discovery demands) and 'tripping' (obstruction of reasonable discovery demands) can actually improve a party's settlement position;
- Some lawyers may be guilty of 'meter-running';
- If Examinations for Discovery are used as a means of discovery of documents, it will be very inefficient.

The conviction that discovery is good, and more is better, has been firmly entrenched, and any suggestion to the contrary may be firmly resisted by the profession.

THE PROPOSAL

There have been many calls for restrictions on the Examination for Discovery including suggestions that they be limited by Rule to a fixed period.

The Committee disagrees with this approach.

First, if the rationale behind the whole process is that it is an effective means of learning about the opponent's case and obtaining admissions in support of one's own case, and especially those matters which otherwise might not be disclosed, then to restrict the process could defeat its purpose.

Secondly, it probably is true that in certain cases, serious abuses of the discovery process do occur. But it is not so widespread as to require basic changes in the discovery rules for all cases.

Furthermore, discovery properly conducted and correctly used at trial can markedly reduce the length of trial by reducing both cross examination and the need to call witnesses.

Development of the discovery procedure has been profoundly influenced by the belief that pretrial disclosure of facts expedites the resolution of disputes and promotes early settlement. After completing discovery, counsel should know the strengths and weaknesses of both sides of the case and should consider it his ethical and professional

² E.W. Wright, 'Controlling Discovery Abuse: A Microcosm of Procedural Reform' (1987) 66 *Canadian Bar Review* 551.



duty to analyse both positions and seriously attempt to settle the dispute.

RECOMMENDATION 101

Discovery Conferences should be used to control abuses and promote the conduct of discovery in the most economical and convenient form possible.

The Rules Committee should be asked to develop a rule with respect to Discovery Conferences. The following is offered as a suggestion:

- 1) At any time after commencement of the action the parties may apply for a discovery conference, or the pre-trial judge may on his own motion so direct.
- 2) At the discovery conference, the pre-trial judge may make a direction establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be varied or amended whenever the pre-trial judge considers it appropriate to do so.

Some submissions to the Committee suggest abandoning Examinations for Discovery, in whole or in part, in favour of Interrogatories. However, the American experience is that Interrogatories are subject to abuse in much the same way as oral discovery. Furthermore, they do not afford an appropriate method of enquiry with respect to issues of credibility. The proper use of both forms of discovery provide the best method of economical and expeditious pre-trial information gathering.

The solution to the problems that have been described lies in a professional Bar, skilled in the proper use of these techniques and determined to avoid the abuses which may creep into the system.



RECOMMENDATION 102

Courses should be developed by Continuing Legal Education and Professional Legal Training Course to demonstrate not only proper use of discovery techniques, but also their improper use; and to foster in the profession the skills and motivation necessary to use discovery procedures and techniques efficiently and economically.

If maximum benefit is to be derived from Examinations for Discovery counsel must take seriously their responsibility to properly prepare their clients for discovery and to be sure that they are equipped with all the documents they are likely to need to answer the questions put to them.

(A very significant expense associated with Examinations for Discovery is the cost of transcripts. This subject is addressed in the Chapter on Technology.)

Expert Witnesses

THE PROBLEM

Lawsuits, like so many other aspects of modern life, have become more and more technical. Engineers, accountants, appraisers, medical doctors and many others are called on regularly to give their opinions on technical aspects of litigation and then, if necessary to give evidence at trial.

To allow time for adequate preparation, the Evidence Act requires a written statement of the expert's opinion to be given to the other side at least 30 days before the expert is called to testify at trial. In short trials, this results in the defendant filing his expert's report before he has had the opportunity to review the plaintiff's expert report.

The written opinion of the expert can be given as proof of the expert's opinion, without the necessity of calling the person as a witness, as long as the statement has been given to the other side 30 days in advance.

The Supreme Court Judges submission to the Committee proposes that these time limits be moved ahead to 120 days before trial to encourage earlier preparation and negotiations. Others worry that this



may impose a heavy burden on cases that are destined to settle in any event.

Motor vehicle accident cases pose a particular problem. Like all other types of cases, the vast majority of them do settle before trial. However, in almost every case, they will not settle until expert reports (usually medical reports) have been exchanged. If that is not done until 30 days before trial, no meaningful settlement negotiations will take place until then. Because motor vehicle accident cases constitute 40 per cent of the trial list, this causes serious problems for those responsible for trial scheduling.

THE PROPOSAL

Expert reports should be exchanged as early as possible. They help to define the issues and the relative strengths of each party's case and for those reasons they can promote settlement.

On the other hand, expert reports are expensive, often unnecessary and many cases may be settled without them. The Committee recommends an approach that allows for balancing of these two concerns.

It can also be very productive for experts on opposing sides to meet on a 'without prejudice' basis to determine those areas in which there is no dispute and try to isolate the areas of disagreement. These meetings should be encouraged.

Interrogatories of expert witnesses after their reports have been filed can further understanding of their opinions and avoid unnecessary delay, adjournments and prolonged cross-examination.

EXCHANGE OF REPORTS

The recommended Rule 41A allows a pre-trial judge to fix the appropriate time for delivery of an opinion to opposing parties, and to fix a further time for delivery of the response to that opinion.



RECOMMENDATION 103

The Rules and Evidence Act should be amended to allow a judge, upon application at any stage of a proceeding, to fix the times for exchange of expert opinions.

In every case where there is no order, the time for delivery of expert reports should be 30 days before the date fixed for filing the Certificate of Readiness.

In every case where there is no order to the contrary, the time for filing a Defendant's expert report or a report in response, should be 15 days after delivery of the report to which response is being made.

EXPERTS' MEETINGS

In cases involving conflicts between experts, it can be useful to have the experts meet together, with or without lawyers to identify their areas of agreement and disagreement.

It may develop that their underlying assumptions differ and that accounts for the differences in their opinions. These issues are much better sorted out among the experts themselves than at trial. These meetings should be encouraged by counsel.

INTERROGATORIES OF EXPERTS

Another means of improving understanding of the experts' opinions is the use of interrogatories after the exchange of reports.

Rule 29, which governs interrogatories, currently provides for Interrogatories only of another party, or on a director, officer, partner, agent employee or external auditor of a party.

RECOMMENDATION 104

Rule 29 should be amended to allow for interrogatories to be served on an expert whose report has been served by a party adverse in interest.



Interrogatories

THE PROBLEM

Interrogatories have never been popular in British Columbia although they are now being used more often, in complex litigation. Most lawyers are unfamiliar with them and see them as a great deal of work. It is true that they take time to draft, but the time that counsel takes deciding what admissions are needed and how to frame the questions is time well spent in terms of preparing the case.

In the United States, where interrogatories are used extensively, they have been much abused and discredited. This has not been the experience in Great Britain where they are used also.

A major reason for the abuse is the indiscriminate use of the word-processor.³ Standardized, all-purpose questions are fired off in great profusion. Instead, questions should be tailored for a specific case to elicit the information that is relevant to the issues raised by the pleadings.

Another cause of abuse of interrogatories in the United States is the wide scope of discovery permitted there. That problem should be avoidable here, where the scope is limited to issues raised by the pleadings.

THE PROPOSAL

Interrogatories are simply a set of written questions posed to a person on the opposite side of a lawsuit, which must be answered in writing and on oath. Properly used, they can be an efficient and economical means of obtaining admissions of fact. They should be used a great deal more than they now are.

The discipline of framing a limited number of interrogatories designed to obtain specific and relevant information in a concise format should form a part of every counsel's training.

3. H.R. Smith, 'The Concern Over Discovery' (1978-79) 28 *Drake Law Review* at 51.



RECOMMENDATION 105

Continuing Legal Education and the Professional Legal Training Course should include course material both encouraging the appropriate uses of well-designed interrogatories and discouraging the indiscriminate application of word processed 'standard' questions.

Interrogatories can never be a replacement for the Examination for Discovery. Oral discovery is almost always necessary on matters of credibility. But they do eliminate the need for the gathering at one place and time of both the examining counsel and counsel for the person being interrogated, as well as counsel for all other parties.

They also eliminate the need for the adjournments of examinations for discovery that so often happen when a person being examined has to go away and find the answers to the questions being put. Another significant saving over the Examination for Discovery is the cost of the reporter. And finally, interrogatories facilitate the compilation of a Statement of Agreed Facts.

Sometimes a person does not know the answer to a question at the time he or she is responding to Interrogatories but later learns the answer. In that case, a Rule should require the person to provide a supplemental answer.

RECOMMENDATION 106

In order to further enhance the effectiveness of Interrogatories, a rule should be adopted which imposes a continuing obligation to answer Interrogatories. Parties who unreasonably fail to provide proper responses to interrogatories and thereby frustrate their purpose, should be penalized in costs.

Settlement Conferences and Mini-Trials

THE PROBLEM

In many instances, despite their best efforts to achieve settlement, counsel are faced with intractable clients who may have exaggerated views of the rightness of their cause, the appropriateness of the



remedy, or the value of the claim. In such cases the intercession of a judge as an objective third party, whose views on the legal issues and available remedies have the respect of the parties, may well provide the catalyst that brings about an agreed resolution of the case.

In the United States, where settlement conferences are common, they have been widely criticized. Serious questions arise as to whether intensive judicial settlement efforts lead to any more settlements than would otherwise have occurred.

Judges in British Columbia with experience in Settlement Conferences believe that, properly handled, they can save considerable time and money. This is a subject that should be analysed further on the basis of statistical information.

THE PROPOSAL

Settlement conferences and mini-trials are both procedures that can open the door to settlement. They are effective only when the parties are committed to making them work, so they can never be mandatory. But lawyers must be encouraged to make much greater use of these tools than has been done in the past. The Bench too should recognize their proper role in promoting appropriate settlements.

RECOMMENDATION 107

More and better use should be made of Settlement Conferences and Mini-Trials, in appropriate cases.

RECOMMENDATION 108

Procedures should be established that will allow both the Settlement Conference and the Mini-Trial to achieve their full potential as settlement devices.

SETTLEMENT CONFERENCES

A Settlement Conference is a special type of pre-trial conference and should not be confused with a Case Management Conference.

The role of the judge is primarily that of an objective mediator who keeps the discussion on the tracks. The judge maintains an



environment of reason and impartiality with only that degree of pressure which is conducive to settlement. Unlike the judge at a Mini-Trial, the Settlement Conference judge does not necessarily express an opinion of the likely outcome of the case.

The following are some of the areas that are usually canvassed at a settlement conference:

- the possibility of success on the various issues and the exposure of the defendants to the damages claimed;
- the financial resources available to the parties to meet a possible judgment;
- their insurance coverage;
- the benefits of the certainty of an immediate settlement as contrasted with the prospect of an uncertain result in the future;
- the legal costs of the litigation to date, and to trial, and to possible appeal;
- the offers and counter-offers made;
- the cost in time, money and inconvenience which the parties, their employees, witnesses, and experts will incur during the course of the litigation; and
- the worry and concern of the litigants during the litigation period.

These conferences should begin early in the day to permit short adjournments for discussion and negotiations between the clients and their counsel from time to time as the conference proceeds. Those people who have full authority to settle the claim must be present or readily available to give instructions.

Obviously, a settlement conference judge cannot be the trial judge should the case proceed to trial.

Some judges, perhaps because of their personal approach or specialized experience in certain fields, are recognized by counsel or their clients as being more likely to resolve the particular dispute.

Since the purpose of the exercise is settlement, counsel should be permitted to request of the Chief Justice that a particular judge or, preferably, one of several choices, be appointed to conduct the Settlement Conference, when requesting a Settlement Conference. Any such request would have to have the agreement of all counsel. When it is administratively possible, the Chief Justice should assign one of the named judges to the conference.



MINI-TRIALS

The Mini-Trial is another tool for promoting out-of-court settlements which counsel should always consider in seeking ways to economically resolve a lawsuit.

The Mini-Trial resembles an actual trial, but in abbreviated form. The format is flexible, usually worked out with counsel and the presiding judge in advance. Parties with full authority to settle the case should be required to be present throughout.

There are certain items that are usually agreed upon in order to encourage participation in the process. Some of these are:

- no court reporter is present;
- the judge conducting the mini-trial will not conduct the trial, if there should be one;
- no communication may be made to the judge presiding at the actual trial of the events of the Mini-Trial.

An Agreed Statement of Facts and a Statement of Issues of Fact and Law in dispute should be filed in a form which the Mini-Trial judge can readily incorporate into his opinion. However, if this formality interferes with the holding of a mini-trial it should be waived.

The Mini-Trial usually takes place in a courtroom and usually follows this general format:

- a) Counsel in turn relate the evidence of each of the witnesses they would call if there were a trial. They do not embellish that evidence or withhold anything which may assist their opponent's case. (Their purpose in requesting a Mini-Trial - to achieve early settlement - could well be frustrated unless there is a full and frank disclosure of the merits and weaknesses of their respective cases.)
- b) Counsel then refer to discovery questions in support of their cases and to any expert reports relied upon.
- c) All counsel in turn make oral submissions and provide the court with the authorities on which they rely and any memoranda of legal propositions.
- d) The presiding judge gives detailed oral reasons at the close of the Mini-Trial or as soon after as possible. The parties attend to hear the opinion.
- e) The judge does not take any further part in settlement discussions, or any proceeding relating to the litigation.



It is important that a judge deliver full reasons, in order to have persuasive effect on counsel and the parties. It is also important that there be no 'arm-twisting'; the judge is a neutral participant, giving the parties an opinion of the probable outcome.

On the whole, the response to Mini-Trials has been favourable. The Supreme Court Judges say that mini-trials have good results in major litigation, but they are time-consuming. However, the favourable results justify continuing with the procedure.

Special Referees

THE PROBLEM

Complex litigation often presents special problems, such as:

- scientific disputes,
- complex accounting analyses,
- assessment of damages in construction litigation,
- valuation of intangible assets,

and many others.

These can involve detailed analysis of controversial technical theories, or scrutiny of voluminous records. The court does not usually have the time nor the expertise to resolve these technical issues in the most efficient way.

THE PROPOSAL

When a lawsuit involves issues of a highly technical nature, it is often appropriate for the Court to refer these issues to a Special Referee for resolution. Not only will the reference be more economical and efficient than turning the trial into a battle of expert witnesses: it should lead to a better result.

Trial judges and pre-trial judges should be vigilant in their analysis of issues to refer appropriate issues of fact to Special Referees.

The Special Referee may be selected by the parties. If they cannot agree on an individual the Court will appoint one. The cost of the Special Referee should be borne, in the first instance, equally by the parties and in the final event, costs should be costs in the cause.



The courts should encourage Professional Associations, particularly engineers, architects, and accountants, to maintain a register of professionals whose expertise, integrity and reputation qualify them for this quasi-judicial role. These registers should list only those who are willing to serve as Special Referees, with details of their qualifications and experience, and perhaps their rates.

The parties decide the terms of reference and when and how the factual issues will be presented to the Special Referee. If they cannot agree, the judge will give the appropriate directions. Legal issues are always reserved for decision by the Court.

RECOMMENDATION 109

Greater use should be made of Special Referees, where appropriate.

RECOMMENDATION 110

Continuing Legal Education and the Professional Legal Training Course can play an important part by ensuring that all relevant courses fully explain the role and potential benefits of a reference to a Special Referee.



ECONOMICAL LITIGATION PROGRAM

The Problem

There is a range of claims between the upper limits of the Small Claims jurisdiction and approximately \$20,000, which are not now being pursued in the courts. It is simply uneconomical to hire a lawyer to take these cases, and County Court procedures are not tailored for the litigant who wants to take his own case.

The pleadings, motions, and affidavits that must be drafted are difficult and intimidating for most people without legal training and examinations for discovery pose a large obstacle for any lay person. If the person chooses to hire a lawyer, it is those same procedures that result in legal fees out of proportion to the amount at stake.

Everyone recognizes that cases are not unimportant just because they involve small amounts of money. But people with smaller claims cannot afford the luxury of all of the procedures that our rules of court provide.

The Proposal

The committee proposes a new procedure in the County Court, to be known as the Economical Litigation Program. Its object is that simple cases be treated simply.

With simplified procedures and fewer pre-trial hurdles, it may become cost efficient again to hire lawyers to handle these cases, but the rules would also accommodate unrepresented litigants.

This is a new concept and there are many details of the program that will have to be supplied by others, but the features of the Economical Litigation Program as recommended by the committee are outlined below.



RECOMMENDATION 111

A new procedure should be established in County Court, for cases involving \$20,000 or less, to be known as the Economical Litigation Program. With simplified procedures it would accommodate unrepresented litigants and would also make it possible for lawyers to take these cases at a fee that is in proportion to the amount at stake.

The essential features of this program would be: easy-to-use forms; a pre-trial conference before a Master or Registrar; no examinations for discovery; a shorter, less formal trial and an early trial date.

ELIGIBILITY

Claims for debt or liquidated damages¹ in amounts between the upper limit of Small Claims jurisdiction and \$20,000 would automatically be assigned to an Economical Litigation Program. Anyone with a larger claim who wants to use this procedure could do so by abandoning that part of the claim which exceeds \$20,000.

There will be cases that are unsuited to this simplified procedure, even though they may involve small amounts of money. A judge would have the power to order such a case out of the Program and into the normal litigation process.

There will be other cases that involve much larger sums of money and yet are very well suited to this program. A claim on a promissory note is an example. In those cases, both parties might choose to use the Economical Litigation Program in the interests of saving time and expense. In that case, if both parties consent to going into the Program, the final judgment in the case would not be limited by the \$20,000 ceiling.

Although many minor motor vehicle accident cases might make good use of this program, it was decided that at this time, claims for general damages should only be included if the plaintiff agrees that

¹ 'Liquidated damages' is the term used to describe a claim for damages in an amount that is certain. For example, two people may have agreed by contract that if either of them breaches the contract, the damages will be \$1,000. By contrast, a claim for 'general damages' is a claim for an amount to be fixed by the court. An example would be a claim for 'pain and suffering' in a personal injury case.



damages be limited to \$20,000. After the program has been in operation for a time, it should be reviewed. If it is operating satisfactorily, consideration could then be given to expanding its application.

RULES & FORMS

A set of rules should be drafted in plain language and made readily available to anyone.

As far as possible, the forms to be used in this program should allow users to fill in the blanks or choose from a list of options. There should be as little original drafting required as possible. Each form should tell the user what is the next step in the procedure. Pleadings should be narrative in style, more closely resembling the pleadings in Small Claim Court. Formality should be discouraged. In the Plain Language chapter the committee proposes a Plain Language Committee and recommends the design of these forms as a top priority project for that committee.

As a means of reducing costs, litigants should be encouraged to use acquaintances to serve documents where possible, rather than professional process servers.

PRE-TRIAL CONFERENCE

If people are going to be encouraged to represent themselves, they may need some assistance before the day of trial. They may need guidance, for example, to sort out what are the key issues that must be proven, or which witnesses will be required. Also, those responsible for trial scheduling will want to know which trials are likely going to go ahead and how long they will likely take. A mandatory pre-trial conference would be the forum for resolving these issues. Another important function of the pre-trial conference is to explore the possibility of settlement. The conference would be conducted by a Master or Registrar.

At the end of the pre-trial conference the Master or Registrar would assign a trial date, probably after talking by telephone to the trial co-ordinator.

One way of reducing expense and delay in litigation is to establish firm deadlines, close together. For that reason, the pre-trial conference should be set no later than 30 days after the Statement of



Defence is filed. It would be held before a Registrar or Master who could be expected to:

- explore the possibility of settlement;
- consider any interim applications;
- assist unrepresented parties to narrow the issues;
- resolve any discovery disputes (discovery of documents only);
- give directions as to exchange of experts' reports;
- estimate length of trial; and
- set a trial date.

It is critical that the people assigned to holding these conferences be chosen carefully and that they be well trained for their role.

All discussions at the pre-trial conference would be without prejudice to the rights of the parties at trial and this should be made clear to all. That is, nothing that is said at the pre-trial conference could be used against anyone at trial. This will encourage a more frank discussion, particularly of settlement options.

It may be that there will be cases which do not require a pre-trial conference. If the issues are simple, the evidence straightforward, and especially if the parties are legally represented, a pre-trial conference may be unnecessary. In those cases, the parties could file a pre-trial report which would be a form, outlining briefly the essential facts of the case, the issues to be resolved and a summary of the positions of the parties. The form would include a waiver of the pre-trial conference. If the report was acceptable to the Master or Registrar, a trial date would be assigned at that point. If not, a pre-trial conference would be scheduled.

DISCOVERY OF DOCUMENTS

Each party would be instructed to give to the other, before the pre-trial conference, copies of all documents that are relevant to the issues. So that this requirement is understood by all, a clear explanation should be included on the Statement of Claim and the Statement of Defence.

EXAMINATION FOR DISCOVERY

There would be no examination for discovery. Although it is a useful procedure it is inappropriate when parties are unrepresented by counsel, and probably not worth the cost in many cases.



INTERLOCUTORY APPLICATIONS

There would be no interlocutory applications without leave. Leave could be granted at the pre-trial conference and applications could be made at the conference.

TRIAL

The trial should be short and conducted in a less formal atmosphere than normally prevails in County Court. A videotape of one or two model trials, illustrating each step in the trial process could be produced and made available in courthouses for people to view on a drop-in basis while preparing for their case. This might help to relieve some of the burden of explanation from the trial judge.

It will be important that early trial dates be made available. The goal should be that these cases be tried within three months of the filing of the Statement of Defence.



MASTERS AND REGISTRARS

More than 50,000 Chambers applications¹ were heard in Vancouver alone last year. Approximately 25,000 more were heard in other centres throughout the Province.

This represents a growing trend. Until 1976, all Vancouver Chambers applications, both contested and uncontested, were heard by one Judge. At about that time a second full-time Judge was committed to Chambers and the list was split between contested and uncontested applications. Increased demand led to the development of the referral system: Chambers applications are referred to any Judge who becomes available during the course of the day. In 1985 a third Judge was committed to hearing Chambers applications in family law matters.

This year the Court has had to take further measures to try to handle the growing number of interlocutory and other applications. Uncontested matters are now allocated among approximately five Judges. These Judges hear as many uncontested applications as possible between 9:30 and 10:00 when their trial duties begin. At that time any applications still unheard are given to the Judge assigned to uncontested Chambers for that day.

Besides the three full-time Chambers Judges there is a fourth Judge assigned to hearing pre-trial conferences. These assignments are rotated among the Judges of the Court. Also, there are Judges on Chambers duty in New Westminster and Victoria every day. This means that there are a total of six Supreme or County Court Judges dealing with Chambers applications full-time in addition to all the Judges hearing applications on a referral basis.

¹ Chambers applications include many procedural applications which are brought in the course of a lawsuit: to add a defendant, for example, or to amend pleadings. They include applications to enforce Rules of Court: to force a party to produce documents, for example. These are referred to as 'interlocutory' applications. There are also interim applications, such as applications for custody of a child during the time before trial. Some statutes require a proceeding by way of Petition and affidavits rather than a trial with witnesses and these are heard in Chambers. An example of this is applications for foreclosure.



In the main judicial centres outside the Lower Mainland and Victoria, Chambers is held by a County Court Judge sitting as a Local Judge of the Supreme Court one or two days a week. The result is that the equivalent of 10 County and Supreme Court Judges of a total of approximately 80 Judges are committed to Chambers work on a daily basis.

The Chambers situation presents two problems: many of these applications should not be necessary. Some could be dealt with by way of 'desk order', without the need for appearance. Others are the result of failure of counsel to agree on matters on which they should agree. The Committee has made recommendations on page 127 to expand and clarify the range of orders that can be made on the basis of written material only. Further recommendations have been made in the chapter on Costs which are aimed at reducing the number of unnecessary applications in Chambers.

However, even if the number of Chambers applications can be significantly reduced, the fact remains that these applications could be more efficiently handled by people who are dealing with them on a daily basis. They do not represent an efficient use of judicial time.

Legislation was enacted in 1976 allowing the appointment of Masters who could hear many of these applications, but since that time only one has been appointed.

The Proposal

The Committee recommends the appointment and use of Masters to hear all those interlocutory applications within the scope of their authority in those judicial centres where the workload warrants it.

This will have several advantages over the present system.

- It will be more efficient: by dealing with interlocutory matters on a daily basis Masters would become more efficient than are Judges who are exposed to that work only periodically for a week or so at a time.
- It will eventually reduce the volume of applications: a small number of Masters dealing regularly with interlocutory applications will develop a more consistent approach than is possible when the work is rotated among a large number of



Judges. With consistency comes predictability of result and that should lead to a decrease in the number of applications being brought.

- Judges will be encouraged to make more use of their powers under Rule 32³ to refer to Masters those issues that they are better suited to handling.
- It will increase accessibility: Masters could be available throughout the day for emergency applications more easily than can Judges who have trial responsibilities.
- It will be a less expensive means of providing this service.

Masters have been used successfully in Alberta for at least 30 years and in Ontario since 1923.

British Columbia's *Supreme Court Act* and *County Court Act* provide for appointment of Masters and give them authority to hear such interlocutory applications as may be designated by the Chief Justice of the Supreme Court. That designation was made in August, 1978:

Effective the 1st day of September, 1978, a Master may hear and determine all interlocutory applications except for an injunction and an interim order under the Judicial Review Procedure Act, and those which by any statute are required to be disposed of by a Judge.

This jurisdiction is broad enough to encompass at least 40% of those applications now being heard by Supreme and County Court Judges in Chambers.⁴

At this time there is one Master in the Province, T. J. (Tom) Halbert, in Victoria. There are also four legally trained Registrars in Vancouver, one in New Westminster, one in Nanaimo and one in Kamloops. In addition, the office of Registrar for Prince George is vacant although authorization has been given to hire a legally trained person for that post.

Registrars are occupied at present doing reviews (taxations) of Bills of Costs and solicitors' accounts as well as passing estate accounts, and other matters. In centres where the volume of Chambers work does not require a full-time person, a Master would occupy the remainder of his or her time doing Registrar's work and also hearing referrals from Court pursuant to Rule 32.

³ This is the Rule which allows a Judge to direct an inquiry, assessment or accounting to be done by a master, registrar or special referee.

⁴ Report to the Justice Reform Committee by T. J. Halbert, Master of the Supreme Court, August 30, 1988.



Appointment of a Master in Prince George could free a full day of judge time which could well be applied to the hearing of trials. A similar advantage could be gained in other locations in the Province.

RECOMMENDATION 112

Much greater use should be made of the position of Master in the Province. Obvious locations for their use would be Kamloops, Kelowna, New Westminster, Prince George, Vancouver and Victoria.

Current legislation provides for appointment of Masters under the Public Service Act. This is inappropriate for what is essentially a judicial position. Their duties are analogous to those of a Provincial Court judge and therefore their qualifications, terms of employment and salaries should be at that level.

RECOMMENDATION 113

Masters should be appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, with the consent of the Chief Justice of the Supreme Court.

Masters of the Supreme Court should have qualifications equal to those of a Provincial Court Judge and should be employed on the same terms and at the same rate of pay.

This will require that Section 15(1) of the Supreme Court Act and s. 13(1) of the County Court Act be repealed and replaced with provisions to the effect that:

(1) The Lieutenant Governor in Council on the recommendation of the Attorney General made with the consent of the Chief Justice of the Supreme Court, may appoint such Masters of the Supreme (or County) Court as are considered necessary.



APPEALS

The Problem

The right to appeal a decision to a higher court was not always a part of our judicial system. However, that right is by now well established. Almost every decision of a government official or agency or administrative tribunal or a court gives rise to a right to appeal to some higher body.

Today there are more than 120 provisions contained in statutes, giving a right to appeal to a court. Almost all of these appeals are to either the Supreme or County Court.

Among these statutory provisions there is wide variety. Some spell out very clearly the steps to be followed on appeal while others are vague and ambiguous. Although the details vary considerably, they tend to fall into two categories: they call for either a trial *de novo* or review of legal error.

Trial *de novo* means 'new trial'. The court is expected to re-hear the entire matter. Some statutes state clearly that the appeal shall be a trial *de novo*; others refer to a hearing 'on the merits' and this is interpreted as meaning a trial *de novo*.

The second kind of appeal is found in statutes that make it clear the court is to consider legal error only. A review of legal error is based on the record of the proceedings being appealed from. Usually there is no new evidence called and the court makes its decision based on written material that is filed and oral argument. This is the kind of appeal that results when a statute refers to an appeal on 'a question of law'. Applications under the *Judicial Review Procedure Act* fall into this category.

Most of these statutory provisions, however, are not clear. The courts are often asked to decide exactly what sort of appeal is intended by the statute, at considerable expense to the parties. This is an expense that they should not have to incur.



Procedures to begin the appeal process also vary. Some require a 'notice of appeal' and others a 'notice of intention to appeal'. Some are brought by 'petition' or 'application' and others by 'stated case'. The rest either do not fall into any of these categories or there are no procedures defined at all.

In those cases, where the procedure is not set out in the particular statute, Rule 49 of the Supreme Court Rules applies. Under this rule, the person who is appealing files a notice of appeal with the Court. This notice includes an application to the Court for directions as to how the appeal is to be conducted. The application for directions will normally be heard by the Court within seven days. At that time, the Court may order, for example, that evidence be given at the appeal by affidavit or in person, or that the appeal will be by argument on a point of law. Time limits can be imposed at that stage. The Court can also, at this application for directions, dismiss the appeal entirely.

The Proposal

There need only be two distinct appeal procedures: a new trial, or a review on a point of law. There should be an *Appeals Procedure Act* that would clearly set out the procedures to be followed on each of these. There may well be room for variations within these two models, to accommodate particular circumstances but any appeal to a Court should be able to fit within one of the two.

Then each statute which provides for an appeal to a Court should refer to the *Appeals Procedure Act* and designate which of the two procedures is to be followed. If there are exceptional circumstances that require a special appeal procedure not provided for in the *Appeals Procedure Act* then the statute should clearly define the process that is to be followed.

RECOMMENDATION 114

A new *Appeals Procedure Act* should define two distinct appeal processes: a new trial or a review on a question of law.

Each statute that provides for an appeal to a Court should either clearly define the appeal procedure or refer to the *Appeals Procedure Act* and designate which of the two procedures applies.



Procedures for an appeal by way of a new trial do not need to be nearly as extensive as the Supreme Court Rules provide for trials generally. Discovery procedures, for example, should be largely unnecessary as the evidence has already been heard once. The *Offence Act* contains provisions for a basic procedure which is well tested in the Courts. This procedure could easily be adapted in the *Appeals Procedure Act*.

Procedures for an appeal by way of review on a question of law might well follow those contained in the *Judicial Review Procedure Act*.

With these recommendations in place the parties to appeals will know what sort of proceeding they are entering into and how to conduct it expeditiously, without the uncertainty that now exists.



LAWYERS' FEES

A merchant may properly sell a second best article for a lesser price, but a lawyer must, whatever the fee, throw his whole abilities into any case, regardless of pay. He has no second best talents for sale. What he sells is his best, and must be paid for as such, by such as can pay. Therefore I think the cost of contentious litigation cannot be lessened by a reduction of fees, although it might, possibly, be reduced by simplification of procedure.¹

The high cost of legal services is one of the greatest barriers to access to the justice system. In its public hearings, members of the Justice Reform Committee were moved by stories from litigants who had been caught up in what they found to be the startling costs of litigation, of which lawyers' fees form the major part.

Losing a lawsuit is bad enough but some people find that they cannot afford to win either.

It is recognized that many lawyers often subsidize their clients' cases either by advancing money from their own funds to cover expenses related to the litigation, or by reducing their fees. Lawyers who take Legal Aid cases are paid under an inadequate tariff; others take cases without charge. As well, a great majority of lawyers charge fees that are moderate and reasonable.

Even so, legal fees remain beyond the ability of many people to pay, even when they are not excessive in terms of the work done.

Throughout its discussion and debate about procedural reforms the Committee has kept a close eye on the possible impact on legal fees. As stated in the discussion of pre-trial Case Management, procedures have become far too complex for many cases and this leads to fees which may be justified by the time spent but are out of proportion to the amount at stake.

¹ J.O. Wilson, "The Law and the Profits" (1959) 17 Advocate at 141.



With these considerations in mind, the Committee has designed a procedure to make it easier for people who wish to take their own cases in County Court if the amount involved is \$20,000 or less. It will also allow lawyers to take cases at that level at a fee that is economical. (See Economical Litigation Project.) Procedures have also been designed for cases that will not qualify for this program, to eliminate unnecessary expense.

The Committee is hopeful that its recommendations for procedural reform will be adopted and that, if constructively applied by the Bench and Bar, they will have the result of lowering fees for many clients.

BILLING ARRANGEMENTS

Today, lawyers sometimes bill their clients on the basis of a fixed fee. That is, the lawyer and client agree ahead of time on the work to be done and the fee to be charged. Most commonly lawyers make arrangements with their clients to be paid on the basis of an agreed hourly rate. For some types of work, particularly claims for damages for personal injury, contingency fees are the norm. Under a contingency fee contract, the client agrees to pay the lawyer a percentage of whatever amount is recovered. If the client loses the lawyer gets no fee.

Traditionally, lawyers billed on the basis of a 'lump sum' and that is still done today in some cases. When the work is done, the lawyer draws up a bill, usually taking into account a general idea of the amount of time spent, the type of work it was, the results of the case, and the ability of the client to pay.

THE LEGAL AND ETHICAL FRAMEWORK

Ruling 5 of the Law Society of British Columbia's Professional Conduct Handbook says:

No member shall charge unreasonable fees.

The *Legal Profession Act* defines 'conduct unbecoming a member of the society' to include conduct that the society deems to be 'contrary to the best interest of the public or of the legal profession', or 'to harm the standing of the legal profession.'



That Act also states that it is the object and duty of the Law Society to uphold and protect the public interest in the administration of justice.

Overcharging by lawyers where it does occur is clearly contrary to the best interest of the public. It also harms the standing of the profession in a very serious way.

RECOMMENDATION 115

In the interests of fulfilling its duty to protect the public interest in the administration of justice, the Law Society must be vigilant to exercise its disciplinary powers in instances where unreasonable fees have been charged.

REVIEWS OF LAWYERS' ACCOUNTS

It used to be that a client who wanted to dispute a lawyer's bill which was based on a written fee agreement - in particular a contingency fee agreement - had to go to the Supreme Court.²

Legislation enacted in 1988 now provides a simpler, less expensive route. An application now can be made to the Registrar of the Court for a review³ of the account. The hearing takes place at the courthouse, before a Registrar. It is usually informal. Each side presents its case, sometimes with witnesses, usually sitting around a table with the Registrar.

The Registrar may modify or cancel the contract if he or she considers that the contract is unfair or unreasonable under the circumstances existing at the time the contract was entered into.⁴ If the contract is cancelled, the Registrar will set the amount of the bill as if there had been no agreement.

On the other hand, the factors that are taken into account on the review of a bill where there is no written fee agreement were

² *Barristers and Solicitors Act*, now repealed and replaced by *Legal Professions Act*.

³ In line with this Committee's recommendations with respect to plain language, this procedure is referred to in this report as a 'review' of an account.

⁴ *Legal Profession Act*.



established in the well-known case, *Yule v. City of Saskatoon*⁵ and they are:

- the extent and character of the services rendered;
- the labour, time and trouble involved;
- the character and importance of the litigation in which the services were rendered;
- the amount of money or the value of the property involved;
- the professional skill and experience called for;
- the character and standing in his profession of the counsel; and
- the results achieved.

HOURLY RATES

In recent years there has been a trend among lawyers towards keeping track of time spent on a case and charging the client on an hourly basis. Some lawyers are more meticulous than others about recording every unit of time, but it is generally accepted practice, with the possible exception of criminal lawyers and some doing personal injury work.

If the amount of time spent on a case is multiplied automatically by the hourly rate, without regard to any other factors, the result will often be unfair. A client will pay more for the same work done by an inefficient lawyer than by an efficient one. Responsible lawyers who charge on the basis of an hourly rate do adjust their hours to take into account time that was spent unproductively and also their client's means and other relevant factors.

However, if a bill based on an agreed hourly rate is challenged, the Committee is advised by a Registrar of the Supreme Court that it is not clear whether a Registrar could base a decision on those principles established in *Yule v. City of Saskatoon*, listed above.

RECOMMENDATION 116

The Legal Profession Act should be amended to make it clear that the principles in *Yule v. City of Saskatoon* do apply to a review by the Registrar of a contract for fees.

5 (1955) 17 WWR 296.



CONTINGENCY FEES

Contingency fees, without doubt, offer access to the justice system for many who otherwise would not be able to afford to pursue a claim. They allow the poorest litigant to hire the best lawyer.⁶

Contingency fees are most commonly used in cases involving claims for damages for personal injury. They come in for criticism when there is a very severe injury - brain damage or a paraplegic case, for example - and the lawyer receives a fee that is not justifiable in terms of the work done.

However, the overwhelming majority of cases are quite different: ICBC reports that approximately 66% of claims against it are worth less than \$25,000. Most lawyers agree that at that level their fees on a contingency contract are less than they would be if they had billed on an hourly rate. Another 20% of writs issued involve cases between \$25,000 and \$100,000. At that level of award, the lawyer's contingency fee is probably slightly higher than the hourly rate would be *only* if the case does not have to go to trial. It is only in the remaining 14% of cases, involving more than \$100,000 where contingency fees can be considerably higher than an hourly rate bill would be.

The justification for the premium is that the lawyer takes the risk that he could be paid nothing, or very little, if the case is lost or if the award is small.

A Law Society committee on contingency fees recommended in 1982 a sliding scale of maximum fees: 50% on the first \$2,000 recovered; 40% on the next \$8,000; 33.3% on the next \$190,000; 25% on the next \$300,000; and 10% on any amount over \$500,000. The Committee cannot comment on the specific rates but endorses the concept as a means of controlling abuses.

RECOMMENDATION 117

The Benchers of the Law Society should reconsider the recommendation of the 1982 report of their committee on contingency fees and use their power under s. 78 of the Legal Profession Act to make a rule establishing a sliding scale of maximum contingency fees.

⁶ Contingency fees are not allowed for services relating to child custody or access. In relation to other matrimonial matters, a contingency fee is void unless it is approved by a Supreme Court Judge. (*Legal Profession Act*, s. 78).



The Committee discussed at length the matter of reviews of lawyers' accounts and the factors that should be considered on such a review, and particularly the requirement that the review be confined to the circumstances as they existed at the time the contract was entered into. It appears that the legislation merely reflects the law as it had developed on that point. However, because new legislation has only come into effect in 1988 it was decided not to recommend any further change before the effect of that law can be assessed.

COMMUNICATION WITH CLIENTS

There is a pressing need for more and better communication between lawyers and clients on the subject of fees and the cost of litigation generally.

Most of the dissatisfied litigants that the Committee heard from had a common complaint: their lawyers never told them how much it would all cost. They didn't necessarily feel that their lawyers had overcharged, but they felt they had not been prepared for the amount of the bill.

Lawyers generally find it difficult to estimate for clients what a matter will cost. Particularly in a lawsuit, where so much depends on the positions taken by the other side, it can be almost impossible to predict the ultimate cost.

Nonetheless, clients do need to have some idea of what they are getting into, and as the situation changes, they need to be kept informed. Many lawyers now budget their cases: taking into account the total amount at stake and the complexity of the case, they decide how much is likely to be spent on the lawsuit and give the client an estimate. Then they allocate a portion of that total to each anticipated stage of the proceeding.⁷

This allows them to warn the client if, for example, examinations for discovery are running so long that they have exhausted their share of the budget. The lawyer and client together can then decide whether to make another offer of settlement, or to cut back on further discoveries, or to revise the budget. One of the major expenses in many cases is the cost of experts reports. Although they do not form part of the lawyer's fee, they can be a very heavy burden for the client and lawyers need to keep clients informed of this expense as it is incurred and to include these items in the budget for the lawsuit.

⁷ See *Canadian Bar Association Code of Professional Conduct* (1987), chapters II and XI.



This budgeting approach saves the client from a shock at the end. It also reminds the client that there is a cost to pursuing the issues in dispute. More lawyers should be taught and encouraged to adopt this approach.

The Committee also feels that the low number of complaints made to the Law Society about lawyers' fees, and the small number of reviews before the Registrar may be partly due to clients' lack of knowledge about their options. Experience shows that even if lawyers tell their clients about the right to a 'taxation' the words are likely to be confusing and the process intimidating.

RECOMMENDATION 118

To benefit clients generally, Continuing Legal Education and Professional Legal Training Course should offer programs that will teach lawyers how to budget a lawsuit.

RECOMMENDATION 119

The Law Society should encourage its members to see that their clients' expectations of a lawsuit more closely match their own. The Law Society also should consider ways of better communicating information to the public at large about lawyers' fees generally and the means available for having lawyers' accounts reviewed.



COSTS

Background

GENERAL PRINCIPLES

The idea that a person who wins a lawsuit should recover at least some of the costs of the suit from the loser, is a very old one.

It goes back at least 700 years in the English courts and it is founded on a notion of fairness. If a person is proved right in a court of law, that person should be indemnified for his expenses, at least in part.¹ But it is not a universal idea. American courts, as a general rule, require each party in a lawsuit to pay their own costs, win or lose.

The basis for that rule is that people should not be discouraged from bringing a lawsuit by the fear of having to pay the other person's costs, if the suit is unsuccessful.

Our rules on costs are an attempt to strike a balance between these two concerns. On the one hand, a person who is successful in a lawsuit should have some contribution to the expense of that suit. On the other hand, the costs that will have to be paid by the loser should not be so great that people will be discouraged from pursuing lawsuits which they otherwise feel are justified.

The mechanism for achieving that balance is the Tariff of Costs.

In recent years, the use of costs has assumed two additional roles: that of encouraging settlements and discouraging unnecessary applications in a lawsuit. A person who turns down an offer of settlement before trial and then gets a less favourable judgment at trial, pays a penalty in costs for having rejected a reasonable offer.

¹ In Small Claims Court, costs are not awarded: each party pays his or her own.



And a person who brings or defends a pre-trial application unnecessarily can be ordered to pay the costs of the application to the other.

Some lawyers have told the committee that these rules are not working as they should and need adjustment.

THE PRESENT SYSTEM

A. THE BILL OF COSTS

The general rule in civil actions in British Columbia - either in County or Supreme Court - is that 'costs follow the event'. That means that in the normal case, the person who wins is entitled to costs from the losing party.

The lawyer for the person who has won the case will prepare what is called a 'Bill of Costs'.

To do that, the lawyer goes to Appendix B of the Supreme Court Rules. The Appendix includes a Basic Tariff. This Tariff lists most of the steps that would be taken in any lawsuit and gives an amount for each. In some cases, minimum and maximum amounts are given.

These amounts have nothing to do with the amount that the lawyer may charge his or her own client. They are the amounts that one party must pay to another. They are referred to as 'party and party costs'.

The Bill of Costs will list each proceeding that was taken, and the applicable amount.

But it is not always that simple. Depending on the amount involved in the lawsuit, that total can be multiplied by as much as three times.

Where there is no amount of money involved, or where the amount cannot be determined, the total will be multiplied by two.

And there is a further complication. Besides the Basic Tariff, Appendix B also contains a Schedule of Maximums. This schedule puts a ceiling on the amount of costs that can be recovered, no matter how much money was involved.

So, the tariff amounts for all the stages in the lawsuit are added up; the total is multiplied by the applicable amount, if any; and then the total is reduced by any amount that may be necessary to bring it within the Schedule of Maximums.



Then the disbursements are added to the Bill of Costs. Disbursements are the expenses, other than legal fees, that the party incurred in the course of the proceeding. They include such items as transcripts, medical reports, photocopying and delivery charges.

When complete, the Bill of Costs will be sent to the losing party. That person might simply agree to the amount and pay it.

B. TAXATION OF THE BILL OF COSTS

But in many cases, the other party will challenge the figures. The procedure for review of a Bill of Costs is called 'Taxation'. It takes the form of a hearing before a Registrar of the Court.

The party contesting the bill will take out an Appointment before the Registrar and serve the Appointment on the other party.

At the appointed date, both parties and their lawyers will appear before the Registrar in a hearing room. The party who prepared the Bill of Costs will defend it, item by item, and the other will dispute it. Eventually, either at the end of the hearing or some time later, the Registrar will 'tax the Bill of Costs' at a certain amount and that is the amount that the losing party will have to pay the winner.

Taxation of a Bill of Costs can be an expensive proposition and for smaller amounts, generally not worth the expense. But with larger amounts - and disbursements can run into very large amounts - the Bill will very often be taxed, adding again to the expense of litigation.

C. APPENDIX C

Appendix B, with its Basic Tariff, was mentioned above. But there is also an Appendix C. It contains a Tariff of Costs between Solicitor and Client.

This is similar to the Basic Tariff in that it sets out amounts for the steps in a proceeding that one party may be required to pay to another. Basically, they are 'party and party costs' but on a higher scale than Appendix B. They are referred to as 'solicitor and client costs'. Again, they have nothing to do with the amounts that the lawyer will charge his or her own client.

In the normal course, a judge will award costs on a 'party and party' scale. But where there are special circumstances - for example, where one party has been responsible for unnecessarily prolonging or complicating the proceedings - costs may be ordered on a 'solicitor and client' scale: that is, under Appendix C.



In fact, because of the differences in the way the two tariffs operate, it sometimes turns out that a higher amount can be recovered under Appendix B.

F. PRE-TRIAL APPLICATIONS

Orders for costs on pre-trial applications are seldom specifically made. The normal rule is that if the party who is successful on the motion is also successful at trial, then the costs of the motion will be one of the items to which he is entitled under the Tariff. But the Tariff amount is small and this can come such a long time after the motion that the threat of costs at the end of the day is not usually a significant factor in the decision to bring an application.

Sometimes, though, the judge hearing a motion will make a specific order for costs to the successful party. In order to take advantage of that, the party's lawyer has to draw up a Bill of Costs for the motion and, if the other side does not agree to pay it, have it reviewed (taxed) before the Registrar.

The result is that the litigant cannot afford to recover the costs that were awarded because the cost of the procedure is greater than the amount that can be recovered.

G. POST-JUDGMENT COSTS

A party who has been successful in a lawsuit and then is forced to take further proceedings in order to collect his judgment should be able to collect the full costs of those further steps.

The reasons for limiting the amount of recovery to less than actual expenses, no longer apply once there is a judgment. For example: a person wins a judgment for an amount of money but the other party refuses to pay, forcing the judgment holder to garnishee wages. The person who owed the money should have to reimburse *all* of the extra expenses that the judgment holder was forced to incur in order to collect on his judgment.

H. TERMINOLOGY

'Taxation' is a word with a clear, everyday meaning for most people: money that is paid to the government. There seems no reason to continue to use it for a procedure which is simply a review.

'Party and party costs' is a meaningless phrase to most people. Even more so is 'solicitor and client costs' when it refers to what is really another scale of 'party and party costs'.



The following phrases have all been interpreted by the courts as having distinct meanings. Most lawyers would have a hard time defining them all and most lay people would say that they sound very much alike:²

- 'between solicitor and client';
- 'as between solicitor and client';
- 'as between a solicitor and his client';
- 'as between a solicitor and own client';
- 'as between a solicitor and his own client';
- 'solicitor and his client scale'; and
- 'solicitor and own client scale'.

The committee expects that with the adoption of the recommendations in this chapter, the use of all these various expressions will become unnecessary.

The Problem

The Tariffs of Costs pose these problems:

- 1) Their application is confusing, partly because of the terminology that has grown up around the subject of costs;
- 2) The amounts, it is generally agreed, are not high enough to adequately compensate a winning litigant or to discourage unnecessary litigation; and
- 3) Because of the way costs are imposed in pre-trial applications, they have not been effective in cutting down the number of these applications.

The Proposal

Costs can be an effective tool for controlling abuse of the litigation process and for reflecting the values that underlie the system. But they must be used appropriately and the amounts must be such that they can accomplish their purpose.

The costs that a winning litigant can recover from the loser should cover close to one half of the winner's actual legal fees. Streamlined procedures will reduce the number of routine taxations and so reduce

² M.M. Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1987) at 1-5.



legal bills. And plain language, replacing archaic and bewildering terminology, will remove the cloud of confusion surrounding the issue of costs, for lawyers and lay people alike.

RECOMMENDATION 120

The Basic Tariff under Appendix B and the Tariff of Costs Between Solicitor and Client under Appendix C should be replaced with a single tariff.

This will simplify the process without losing flexibility. A judge who wishes to order a higher level of costs for any reason can simply apply an appropriate multiplier to the basic tariff. In this way the intended result - greater recovery - can be assured and without the extra work that a Bill of Costs under Appendix C now entails.

RECOMMENDATION 121

The Basic Tariff in Schedule B should be tripled. It will then reflect approximately 50% of actual costs to the client.

There should be a regular, mandatory review of the tariff amounts.

The tariff was last revised in 1985 and at that time it was intended to result in reimbursement of 50 per cent of what the actual fee would likely be. The result fell far short of that objective and inflation has widened the gap. A regular review, probably based on a survey of fees such as the one conducted by the Vancouver Bar Association, is necessary to maintain the tariff at the appropriate level.

RECOMMENDATION 122

The minimum and maximum amounts in the Basic Tariff should be replaced with a set amount for each item.

The range of allowable amounts that the tariff provides for various items serves no real purpose. They are the cause of a great many taxations because the person preparing the Bill claims the maximums. Then the person who will have to pay forces a review (taxation), saying the minimums should apply. If there is a single amount, rather than a range, there should be fewer reviews.



RECOMMENDATION 123

The Schedule of Maximums should be eliminated.

If the Tariff of Costs is to fulfill the purpose of providing reasonable reimbursement to the successful party, then it should do so even in long and complex cases. The present ceiling imposed by the Schedule of Maximums results in recoverable costs in longer cases that are an insignificant portion of actual costs.

RECOMMENDATION 124

On all pre-trial applications, there should be an order as to costs at the end of the hearing.

As well as the Orders which a Judge now has the power to make, there must be an option to award costs in a lump sum determined by the judge at the time of the application, up to \$750. These costs should be payable immediately and not at the conclusion of the case, unless the judge orders otherwise.

When one party has incurred costs which are in effect 'thrown away' as a result of an adjournment granted to another party, an order should be made for the amount of those costs, payable immediately.

The committee's view is that many pre-trial motions are brought because

- the parties or their lawyers have not made their best efforts to settle matters between themselves; or
- a wealthier litigant hopes to wear down the other side by bringing on applications that the other cannot afford to defend.

Often clients are either unaware of the number of applications being made or they do not understand the alternatives that are available.

Discretion must remain with the Chambers Judge. However, orders for costs should be used to discourage unnecessary applications. They needlessly run up the cost of litigation for clients and they take up valuable judicial time.

Lawyers will have a greater incentive to work things out with opposing counsel. Where this is not possible, a closer examination will have to be made, probably between lawyer and client, of the real merit of the application, and its value to the case. Also, if unwarranted



applications are penalized by costs payable immediately, wealthier litigants will be less able to take advantage of their opponents by overwhelming them with applications.

The committee recognizes that this imposes an additional burden on judges hearing chambers applications. However, the committee's recommendations, taken together, are intended to reduce the number of applications and the judge who has just heard the application should have little difficulty in dealing with costs at that time.

RECOMMENDATION 125

The word 'taxation' and its various forms should be replaced wherever they appear in the Supreme Court Rules and in the statutes, with plain language that will make sense to lawyers and non-lawyers alike.

The word 'review' is used in this report instead of 'taxation' to refer to a review by the Registrar of a Bill of Costs and that is the term that the committee recommends be adopted. If the wording in the rules and statutes is brought in line with ordinary usage, and lawyers and judges start using the same terminology, there should be fewer frustrated and disappointed clients.

RECOMMENDATION 126

When a party has put another party to further expense to enforce or collect a judgment, the Registrar should award full reimbursement of all those extra costs which were incurred reasonably and properly.

Rule 57 (12) should be amended to that end.



COURT FILING FEES

In April, 1988, while the Justice Reform Committee was holding its public hearings, the Provincial Government increased two sets of fees which have a direct impact on access to the courts. These are:

- Fees for filing documents at the Supreme and County Court Registries and for Sheriffs' services; and
- Fees for filing documents at Small Claims Court and for Sheriffs' services in those matters.

The Committee laments the timing of this fee increase and was affronted that it was implemented without any consultation with the Committee or with users of the justice system.

The effect of these higher fees were pointed out to the Committee by many who appeared before it in the weeks following the increase.

The Law Society of British Columbia told the Committee that fees for a typical matrimonial action, with a three-day trial have gone from \$60 (before the increase) to \$500. This is more than \$300 higher than the cost for the same action in any other province, the Law Society reported. A typical six day personal injury trial, with all the usual filing fees, they said, has increased from \$100 to \$795, compared to \$355 in Saskatchewan or \$181 in Ontario.

The impact may be especially felt in cases involving small amounts of money. Legal Aid lawyers told of the hardship the increased fees would cause to low income clients seeking uncontested divorces. Even if they do the paper work themselves and there is no court appearance, the new \$100 fee to start the proceeding can be prohibitive. In Small Claims Court, the filing fees for a typical action with one enforcement proceeding has increased from \$40 to \$90.

There is a provision in the new Schedule of Fees for the waiver of filing fees for anyone who is indigent; that is, who is needy or poor. The Schedule refers to a 'summary application' for this waiver of fees. The committee is hopeful that a procedure will be devised that will be simple and convenient. It must be one that a person can follow without the need for legal advice or assistance. The Committee



understands that such a procedure is now being worked out by the Chief Justice of the Supreme Court in consultation with the Practice Committee of that Court, the Master, and others.

RECOMMENDATION 127

There should be a simple, straightforward procedure for people who wish to apply for a waiver of court filing fees on the basis that they are indigent.

On the positive side, the Law Society's brief to the Committee also noted that the projected increase in government revenue from the new fees is \$11,000,000. The Committee has made recommendations in this report that will require the expenditure of government funds and this increased revenue from filing fees should provide a source of funding.



SMALL CLAIMS COURT

Monetary Jurisdiction

In British Columbia's early colonial days it was the County Court that was charged with resolving 'small claims' cases. But as that Court expanded its own jurisdiction and became a court where lawyers argued larger and larger cases, it ceased to be a forum where people could feel comfortable acting on their own behalf. By 1895 the legislature recognized the need for a new 'people's court' and created the Small Debts Court. This court was presided over by lay Magistrates and its jurisdiction extended to claims up to L50.

Now Provincial Court Judges sit in Small Claims Court and their jurisdiction has been increased over the years to the current level of \$3,000.

The Committee heard from many people who point to the high cost of pursuing a claim in the superior courts. Many people feel that it is no longer economical to take cases worth \$10,000 to \$20,000 to County Court. For this reason, there is considerable support for raising the jurisdiction of the Small Claims Court as high as \$10,000.

The Committee was sympathetic to these arguments but rejected them in favour of protecting the traditional role of the court. The fear is that cases involving up to \$10,000 would require a new set of pre-trial procedures which would clutter the system.

With more money at stake and more complex procedures, the court would become a forum in which lawyers would play an increasing role. This trend was clearly apparent when the jurisdiction was raised from \$1,000 to \$2,000 in 1979.¹ Immediately before the increase took effect, 15% of Lower Mainland litigants had legal representation at the time they filed their initial documents. A study showed that after the

1 Submission to the Justice Reform Committee by Provincial Court Judge E. O'Donnell, former administrative judge for the Small Claims Courts of the Lower Mainland.



increase, 45% were represented by lawyers. The increase also had a significant impact on the length of trials in the court.

If its jurisdiction were increased to \$10,000 at this time, the Small Claims Court would become in effect what the County Court was in 1895 when the need for a means of resolving small disputes was recognized. In other words, there would soon be a call for a new court to handle the truly small cases.

The Committee recommends instead an expedited procedure be implemented in the County Court for handling those cases. This new procedure is described in the Chapter titled: Economical Litigation Project.

Having said that, the Committee does feel that there is room for some increase in the jurisdiction of the court and recommends that it be raised to \$5,000. It is important that the monetary limit of the court's jurisdiction be reviewed by government on a regular basis, probably every three years.

RECOMMENDATION 128

The monetary jurisdiction of the Small Claims Court should be raised to \$5,000 and should be reviewed regularly.

Access

People who live in remote areas must rely on the mail to forward documents to the nearest Small Claims Registry and receive them back again. This can extend the time periods to the point that people simply do not bother.

The Provincial Court serves 94 locations in this province. Many of these are not permanent locations but they are visited periodically by Provincial Court judges travelling on circuit. The Committee recommends that these circuit courts be designated as 'branch registries' for the purpose of receiving and helping to process Small Claims documents.

Further, government agents should be authorized to receive Small Claims documents for the purpose of faxing them to the nearest registry.



RECOMMENDATION 129

Provincial Courts, travelling on circuit, should be designated as branch registries for the purpose of receiving and processing Small Claims documents. Government agents in remote areas should be authorized to receive Small Claims documents for the purpose of transmission to the nearest registry.

Even people who live relatively close to a Small Claims Court can find it a hardship to be absent from work in order to attend court. This is especially true if several appearances are required, as well as the trips to the court registry to pick up and file documents.

In those centres where the workload warrants it, the Committee would encourage the Chief Judge to consider evening and weekend sitting hours for the court.

Expanded registry hours would also be a great convenience for many people. If they have to take time from work to appear in court, it is very difficult for many to also take time away to attend at the registry. A registry could remain open in the evening or on Saturday, whether or not the court was sitting.

RECOMMENDATION 130

The Chief Judge of the Provincial Court should consider evening and weekend sitting hours for the court and expanded registry hours, where the volume of business warrants it.

Rules and Procedures

Judges who sit in Small Claims Court receive very little guidance from rules or elsewhere as to how they ought to conduct their court's business, which is quite different from that of any other court.²

There is no general agreement as to the components of 'summary justice' although it seems to be the generally accepted goal of the Small Claims Court.

Unlike the *Supreme Court Act*, the *Small Claim Act* does not have its own set of rules. Instead, it refers to the Supreme Court Rules

² *Ibid.*



for anything that is not specifically dealt with in the *Small Claim Act*. The rules that are designed to deal with very complex cases in Supreme Court are entirely inappropriate to Small Claims proceedings. They are also not readily available to the average Small Claims litigant and they are probably not easily understood without some legal training.

Some of the court's forms have been improved in recent years but there is still much scope for improvement. These forms need to be understandable to people who have never had any dealings with the justice system and who do not have access to legal advice.

Oversimplification of procedures, however, must be avoided. For example, Judge O'Donnell pointed out to the Committee that the Small Claims judge has no power to order one party to give the other the particulars of the claim ahead of time. This means that adjournments are often necessary after one of the parties has begun to give evidence.

There needs to be more uniformity of procedures from one Small Claims Court to another. A volunteer group that advises litigants told the Committee that their job is made more difficult by the variation in procedures among the courts at different locations.

A new *Small Claim Act* is needed. The Act should include a clear statement of intention to guide the judges in the application of 'summary justice' and provide for a set of rules appropriate to the court. They should be as simple as possible and should be expressed in plain language. The rules should recognize that the rules of evidence do not strictly apply in *Small Claims Court* since the adversary system is not ideally suited to sorting out disputes between lay people.

There should be greater scope for admission of evidence by affidavit or simply in writing at the discretion of the trial judge. The rules should put reasonable limits on the type of interim applications that may be brought.

RECOMMENDATION 131

There should be a new *Small Claims Act* which would guide the Judges in the application of summary justice, as well as a set of rules appropriate to the Court.

The Committee recommends appointment of a Master Registrar for Small Claims Courts across the province. This person, who would be legally-trained, would ensure uniform practice across the province.



The Master Registrar would visit other court locations periodically for the purpose of training registry staff. He or she would also be responsible for co-ordinating public education and information efforts. Periodic visits

RECOMMENDATION 132

There should be a Master Registrar for Small Claims Courts throughout the Province with responsibility for staff training, ensuring standard practice, and public information.

A study of the current users of the Small Claims Court might be useful in designing a set of rules for the court and planning for its future. For example, the court has always been first and foremost a means of debt collection. Yet there are no Canadian statistics to show the extent of involvement of collection agencies.

A 1977 B.C. study showed that individuals are defendants in the overwhelming majority of cases but are plaintiffs in less than a quarter of the cases.³ It might be helpful to the drafters of the new Act and rules to know whether these patterns are still true.

Security Deposit Disputes

Before it was closed in 1984, the Office of the Rentalsman had authority over landlord and tenant matters. Disputes were often settled over the telephone and there was considerable assistance offered to people who needed it.

According to the Lower Mainland Tenants Rights Coalition, the Rentalsman dealt with about 3,000 monetary claims per year in the Lower Mainland. When it was shut down, the increase in applications to the Small Claims Court was small. Based on phone calls to their Tenants Rights Advocacy Centre, the Coalition concludes that because of the complicated forms and procedures in Small Claims Court and the lengthy time to trial (about nine months in Vancouver), many tenants are simply not pursuing their claims for return of their security deposits.

3 *Ibid.*



A number of the submissions to the Committee made the point that certain landlords take advantage of this fact and routinely retain tenants' security deposits without legitimate cause.

The Committee recommends returning jurisdiction over security deposits to the Residential Tenancy Branch of the Ministry of Labour and Consumer Services. This will allow for quicker and simpler resolution of claims. There should also be an investigation into a means by which security deposits could be held in trust, with part of the interest helping to fund the dispute resolution service.

RECOMMENDATION 133

Security deposit disputes should be handled by the Residential Tenancy Branch of the Ministry of Labour and Consumer Services and not by Small Claims Court.

Enforcement

It comes as a sad surprise to many litigants who pursue their claim to trial, succeed in getting judgment in their favour, and then find that it will be up to them to try to collect the money from the defendant. The cost of enforcing the judgment can amount to more than the judgment itself. It can also take a long time and several more court appearances.

The Garnishing Order Before Judgment is an example of a procedure borrowed from the higher courts which is ill-suited to a lay person's court. This is an extraordinary remedy in that it allows a person who has not yet proved a claim to require money belonging to the defendant be paid into court. Because of its nature, it is subject to abuse.

Enforcement proceedings must be simplified. A successful plaintiff should have the option of having a Judgment Summons hearing conducted immediately after the judge has given the decision.⁴ These should be conducted either by a Judge or at the direction of a Judge by a Registrar who would make a recommendation back to the Judge.

⁴ The Judgment Summons hearing is a cross-examination of the defendant by a judicial officer to determine how and when the judgment will be paid.



RECOMMENDATION 134

Efforts should be made to simplify enforcement proceedings in Small Claims Court. A successful plaintiff should have the option of having a Judgment Summons hearing conducted immediately following judgment. Forms of release should be provided to accommodate a defendant who is willing to pay the judgment on the spot.

RECOMMENDATION 135

Garnishing Orders Before Judgment should be abolished in Small Claims Court.

Appeals

Decisions of the Small Claims Court are appealable to the County Court. Because there is no record kept of the proceedings at a Small Claims Court trial, the appeal takes the form of a new trial (trial *de novo*). This is a very expensive process and often impractical, given the amount of money at stake. Appeals in Small Claims Court give an unfair advantage to those litigants with the time or money to continue the litigation.

RECOMMENDATION 136

Appeals from decisions of the Small Claims Court should be abolished.



ENFORCEMENT OF MUNICIPAL BYLAWS

Municipalities enact bylaws to regulate a wide range of activity within their boundaries, from overhanging branches to construction noise. When people disobey those bylaws the municipality has to lay a charge in Provincial Court and proceed as if it were a criminal offence.

Prior to 1974 municipalities generally had almost daily access to Magistrate's Court, as it was then called. Many municipalities used the Court as a matter of routine and bylaw enforcement was not a problem. In 1974 the Province took over the Magistrate's Courts from the municipalities and assumed responsibility for prosecutions.

Municipalities continued to have access to the Provincial Court for enforcement of their bylaws, but as the volume of criminal prosecutions in that court has grown, bylaw enforcement has often been a low-priority item. Many municipalities told the Committee of their growing frustration with this situation. The Union of British Columbia Municipalities echoed the concern. They recognize that a conscientious prosecutor in a busy courtroom will naturally give higher priority to a robbery case than to a charge of a dog-at-large. But bylaws play an important part in keeping our municipalities pleasant places in which to live and they deserve to be enforced.

Bylaw Court

Many municipalities have asked for a new division of the Provincial Court, dedicated to bylaw enforcement. The Committee has considered this proposal carefully but feels that such a step is unnecessary at this time. A procedure has been operating in Kamloops since 1979 which seems to have been successful. A Sitting Justice of the Peace¹ holds

¹ A Sitting Justice of the Peace is a Justice of the Peace who has been specially authorized by the Chief Judge of the Provincial Court to exercise all the powers of a Provincial Court Judge, in certain classes of cases. Besides the Kamloops appointee there are a number of other Sitting



Bylaw Court twice a month. The rest of the month he is occupied in hearing traffic cases under provincial legislation.

The Kamloops Bylaw Court hears cases relating to traffic, animal control and business licences. The City is responsible for the administration of the Bylaw Court and provides the prosecutor. All fines received by the Court are forwarded to the city. The Bylaw Court uses the same procedure and rules of evidence as does a Provincial Court but in a less formal atmosphere. If there is any argument involving an attack on the bylaw itself, the case goes to the Provincial Court. So far, this has not happened. Kamloops' experience is that its bylaws are more effectively drafted now because of their constant exposure to the Court. The existence of the bylaws is well-publicized and there seems to be more voluntary compliance because of the existence of the Bylaw Court. There is every reason to expect that other municipalities would experience the same results.

The Committee recommends the extension of this program, at first to Kelowna and Prince George. The Kelowna JP would travel to all municipalities in the Interior and the Prince George person would cover the North. When they are not occupied hearing bylaw cases they can deal with traffic matters pursuant to provincial legislation.

RECOMMENDATION 137

Sitting Justices of the Peace should be appointed for Kelowna and for Prince George who would travel to the municipalities in their regions and hear municipal bylaw cases. If successful, the service should be expanded throughout the Province.

This recommendation should not be seen in any way as a call for a return to the days of the lay Magistrate. But the program has been in operation in Kamloops for almost ten years and has been so well received that it deserves to be extended.

If this system of Sitting Justices of the Peace serving entire regions proves successful, then appointments should be considered for Victoria and for the Lower Mainland.

The Province should initially bear the cost of providing the Sitting Justice of the Peace. After the program has been in operation for a time the relative demands of the various municipalities could be



assessed. At that time, an appropriate cost-sharing formula could be agreed upon. However, if most of their time is being spent on traffic matters under provincial legislation, then the Province should continue funding the program.

Ticketing

In 1986 the Province introduced a new ticketing procedure under the *Offence Act*. Under that procedure:

- police and other enforcement officers are authorized to issue tickets for offences against certain provincial statutes;
- anyone who does not wish to dispute the allegation may simply pay the indicated penalty and need not attend court;
- anyone who fails to either pay the penalty or dispute the allegation is deemed to be convicted of the offence and the indicated penalty becomes payable to the Province.

This procedure is now used in the enforcement of many provincial laws, including provisions of the *Liquor Control and Licensing Act*, the *Wildlife Act*, and the *Highway Act*. The Union of British Columbia Municipalities supports implementation of a ticketing program that would allow local governments to enforce their bylaws without having to resort to the courts in every instance.

RECOMMENDATION 138

The *Municipal Act* and the *Vancouver Charter* should be amended to allow municipalities to designate those bylaws that could be enforced by means of a ticket and to set the maximum allowable fine. The municipalities would be responsible for collecting fines and, where there is no payment, issuing summonses and forwarding the file to Provincial Court.

This ticketing program should reduce enforcement costs to the municipalities by avoiding the costs of prosecution in cases where the person does not wish to dispute an allegation. And it will relieve those people from the need to attend court. The 'deemed conviction' procedure also eliminates the need for issuing a summons when the person simply does not respond to the ticket.



ALTERNATE DISPUTE RESOLUTION

'Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser in fees, expenses, and a waste of time.': Abraham Lincoln, 1850.

'It should also be recognized that in many cases the court is sometimes the only protection the weak and the timid have against stubborn and unreasonable adversaries. We must all be careful not to let that important responsibility be transferred to other disciplines whose only remedy (often ineffectual) is reasonable persuasion.': Allan McEachern, CJBC, 1987.¹

Introduction

Litigation - the resolution of disputes through our court system - is the foundation of our Canadian system of justice.

Since early times, our court system has been the machinery by which the law could be enforced against both the strong and the weak. It has been and still is the bulwark of public rights and private liberties.

But litigation in its traditional form has its drawbacks. It is costly. It can be slow. It is public. And the adversarial process with its win-lose perspective is not well suited to the satisfactory resolution of certain kinds of disputes.

More and more, people are looking for alternatives: this is nothing new. There have always been shifting trends. An informal system becomes gradually more and more structured and 'legalized', with explicit legal rules and procedures. Then, as legal institutions become

¹ From a speech delivered at the Canada/United States Legal Exchange, Ottawa, Sept. 1, 1987.



overburdened, resulting in high costs and slower pace, the pendulum swings back towards informal alternatives.²

Long before there were courts as we know them, people were resolving their differences by negotiating and by enlisting the help of clergy and other leaders in the community. The modern equivalents of these simple, ancient techniques are referred to as Alternate Dispute Resolution, or ADR.

They encompass a broad spectrum of methods. Settlement conferences and mini-trials, for example, are integral parts of the litigation process, albeit non-traditional parts. Others, such as court-annexed arbitration programs, are adjuncts to the litigation process. Still others, such as Victoria's Dispute Resolution Centre, operate entirely outside the court system, although parallel to it.

The wide range of available techniques offers an opportunity to address two of the major concerns facing the Justice Reform Committee:

- the overcrowding of the court calendar and
- access to justice.

There is a vast body of literature on this subject which this report will make no attempt to summarize. It does attempt to discuss some of the underlying issues and propose some alternatives. (This chapter will not deal with alternate dispute resolution techniques in family law or criminal law, as they are discussed in other chapters.)

What Is ADR?

'Alternate dispute resolution' is such a far-reaching term that the broad concept is often mistaken for one of its parts. It is also ill-defined and people use it in different ways.

To understand the meaning of 'alternate dispute resolution', it is first necessary to have some understanding of the theory of dispute resolution generally. Basically, there are only three models, with many variations and hybrids:

² J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983) at 7.



NEGOTIATION

Communication for the purpose of reaching agreement is negotiation. Whenever people exchange information and ideas with the aim of changing the other's position, they are negotiating.

MEDIATION

Mediation involves a neutral third party who helps the disputing parties reach agreement. The neutral third party has no decision-making power.

ADJUDICATION

Adjudication is a more formal process in which the disputing parties present evidence and argument to a neutral third party who has the power to make a binding decision. Obviously, a trial of all the issues in a court of law is one example of adjudication.

Everything else is 'alternate dispute resolution' or ADR.

Some people, especially some proponents of particular ADR techniques, limit their definition of the term to those processes which are completely outside the court system. This report takes the broader view that ADR includes a great many techniques that can be extremely useful in the context of litigation.

Beyond the three broad categories discussed above, there are a number of specific methods used in ADR. These all come after the failure of the one technique that all of us use every day to resolve differences of every kind: the unassisted negotiated agreement.³ These are the most common:

CONCILIATION

This is a type of shuttle diplomacy. The neutral person talks to each side separately, reducing hostility and identifying common ground. A conciliator can often bring parties back to the bargaining table after negotiations have failed.

3 B.J. Thompson, 'Preliminary Thoughts on Alternate Dispute Resolution', memorandum written for the Justice Reform Committee (1988).



MEDIATION

The neutral third party meets with both parties (and possibly their lawyers) and helps them negotiate more effectively. The mediator's role is to keep the parties focused on the issues and away from unproductive discussion; to reduce hostility; help identify common ground; define the order of discussions; help the parties develop creative solutions; move the parties from fixed positions; and encourage compromise.

ARBITRATION

This is the most formal of all the ADR procedures. In some ways it closely resembles a trial. The arbitrator weighs the evidence presented by the parties and may call witnesses and retain experts. In some cases the arbitrator will use his or her own expertise to evaluate the evidence. The rules of evidence do not apply, but evidence which a court would admit must be admitted. In the classic arbitration model the arbitrator's decision (usually called an 'award') is always binding.

COMMON FEATURES

Obviously, ADR encompasses a wide expanse of territory. But there are certain characteristics that all these procedures share:⁴

- There is an independent and impartial third person, agreeable to the parties, to help resolve the dispute;
- Participation is voluntary - each side agrees to participate. With the exception of arbitration, the process can be ended by either party at any time for any reason;
- The process has been agreed to by the parties. It is usually quite simple, adaptable, and can be molded to suit the circumstances of the situation; and
- The procedure is entirely confidential.

Why ADR?

The major thrust behind the ADR movement in the United States has been dissatisfaction with the legal system. American courts have become seriously congested, resulting in long delays. Legal costs are soaring. And concerns about the effects of the adversarial process

⁴ *Ibid.*



have led to exploration of the gentler arts of reconciliation and accommodation.⁵

By contrast, the original driving force behind the ADR movement in Canada has been those who promote alternatives to adversarial processes as an expression of their philosophical approach to conflict resolution.

Also, the legislative reform of family law undertaken in the early 1980's has fostered a more conciliatory approach to divorce and child custody matters and invited growth in the area of family mediation.

At the same time, business and industry has recognized some advantages of alternate methods over traditional litigation. Some of these are:

- timeliness: the parties can set their own timetable;
- control over the proceedings: the parties themselves design the process;
- informality: meetings take place outside the formal atmosphere of the courtroom;
- confidentiality: unlike court proceedings, these are not matters of public record and can be held out of the public eye;
- use of an 'expert' as the neutral third party: where technical issues are concerned an expert can be chosen as the third party. This avoids having to educate a judge on technical matters;
- hearings at convenient hours and location;
- a less adversarial environment: the focus is on arriving at a mutually satisfactory solution to a problem, not on winning or losing;
- the possibility of arriving at a commercial solution to a commercial problem: The parties might agree, for example, to a discounted price for future supplies, as compensation for a breach of contract. This option would not be open to a judge who is generally limited to an award of damages.

In public interest disputes, the Ombudsman made a compelling argument to the committee for consensual methods of resolution. He set out in detail the reasons why litigation is not well suited to the resolution of conflicting, though interdependent, interests.

5 A.J. Pirie, 'Dispute Resolution in Canada, Present State, Future Direction', consultation paper for the Law Reform Commission of Canada (1987).



THE AMERICAN EXPERIENCE

Auerbach argues that in spite of all its potential advantages, alternate dispute resolution techniques will never dominate the American social landscape:⁶

'There is every reason why the values that historically are associated with informal justice should remain compelling: especially the preference for trust, harmony, and reciprocity within a communal setting. These are not, however, the values that American society encourages or sustains; in their absence there is no effective alternative to legal institutions.'

It may be that this statement does not hold true for Canada. Canadians may be more committed to the notion of community than to individual liberties.

A great deal can be learned from the rich experience with alternate dispute resolution methods in the United States. However, lessons learned there should not be applied without consideration for the uniquely Canadian characteristics and historical elements that may argue for a different approach.

A new centre for dispute resolution has been created at the Faculty of Law, University of British Columbia. It will be ideally suited to take the lead in building a body of knowledge about what works and what doesn't in dispute resolution, based on Canadian experience while drawing on what has been learned elsewhere.

There are some specific legal issues in ADR that deserve study, such as confidentiality, due process, parties' rights to legal information, and the status of mediated agreements.

The committee recommends that the Centre undertake research into these areas as well as the proper allocation of disputes among the various available dispute resolution mechanisms.

RECOMMENDATION 139

The new Nathan T. Nemetz Centre for Dispute Resolution at the University of British Columbia should conduct the kinds of studies of Canadian ADR projects that have been done in the United States to allow policy-makers to make decisions based on Canadian experience and Canadian values.

⁶ Auerbach, *supra*, note 2.



When Is ADR Appropriate?

Obviously, traditional litigation is still the most appropriate method for resolving a great many disputes. What is needed is a set of guidelines to help policymakers determine which disputes are best handled by which types of procedures. Some of the criteria that are often applied are these:⁷

MAGNITUDE OF THE RIGHTS AT ISSUE

Cases involving a possible violation of fundamental constitutional rights, which would establish precedents for other cases, should always be litigated in the courts. These are public issues, of importance to everyone.

SUBJECT MATTER OF THE DISPUTE

If highly complex technical or scientific factual matters are involved, they should be channeled to ADR procedures which can readily call upon experts as neutrals.

FINALITY

A decision of a judge may end a lawsuit but it often does not end the real dispute. Cases should be heard in forums that can provide resolutions to the real issues in dispute. For example, if a mother and father are arguing about access rights under a separation agreement, a legal determination of contractual obligations is unlikely to finally resolve. On the other hand, if a neutral third party could help them come to an agreement, that might settle the matter.

COST IN RELATION TO DERIVED BENEFIT

The costs of using any particular procedure should be in proportion to what is at stake and the expected result. For example: a trial in a court of law may be the ideal way to resolve a personal injury claim. But if that claim is probably worth \$10,000, then mediation makes more sense, given the cost of taking it to trial.

⁷ A. Sarat, 'The Litigation Explosion' (1985) 37 Rutgers Law Review 319 at 327.



Some Issues to be Addressed

SHOULD ADR PROCEDURES BE MANDATORY?

In mediation-type processes, where the parties are trying to reach agreement, the knowledge that they can walk away from the table if they want to may be an important element.⁸ This may be less important in cases where the neutral will render an opinion or binding decision.

The committee heard reports that the mandatory court-annexed arbitration schemes that have been developed in the United States are now plagued by the long delays of the court system. If people are forced into one of these programs and are not committed to settlement, they may drag their feet and frustrate attempts to process files efficiently.

Also, a mandatory program may overtax the current supply of properly trained neutrals.

Submissions to the committee generally opposed the mandatory diversion of any particular type of case from the court system. (An exception was the matter of security deposit disputes which most agree should be handled outside the court system: this is dealt with in the chapter on Small Claims Court.)

On the other hand, voluntary programs, such as the ICBC pilot project have not attracted enough business to make a noticeable dent in the court calendar.

SHOULD ADR PROCEDURES BE PUBLICLY FUNDED?

Experience at British Columbia International Commercial Arbitration Centre (BCICAC) shows that parties participate much more vigorously in ADR processes if they have invested financially. Neutrals should be paid a reasonable amount to ensure an appropriate level of effort and professionalism. In the case of claims for relatively small amounts, however, anything more than a nominal charge may effectively deny access to those who most need the procedures.

(The role of Legal Aid in the alternate dispute resolution context is discussed in this report under 'Legal Aid'.)

⁸ Thompson, *supra*, note 3.



Options for Handling Motor Vehicle Cases

Because of their sheer volume, motor vehicle cases seem to demand some kind of special treatment. Almost 1,000 actions per month were started in the Supreme and County Courts of British Columbia last year, involving claims arising out of motor vehicle accidents. This is the largest single class of case - almost one-fifth of the total.

About 8,000 motor vehicle cases were placed on the trial list, although only 350 actually went to trial. While most motor vehicle cases do settle, many settle late in the day after substantial costs have been incurred. At a time when the total number of cases filed is declining slightly, motor vehicle cases have increased by more than 15%.⁹

Some say that these cases are usually straightforward and involve few legal issues and for those reasons, some means of resolving them should be found outside of a courtroom. On the other hand, there is the view that no class of case ought to be removed from the justice system; motor vehicle accidents involving personal injuries are serious events in the lives of those involved and should not be shunted off to a 'second-class' decision-making process.

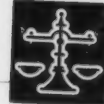
There are compulsory arbitration and mediation schemes in operation in other places and the committee studied a proposal for such a program in detail. However, the committee agrees that this is not the appropriate approach to take in this province at this time. It would be wrong to carve out a certain type of lawsuit and send it outside the court system simply for the sake of relieving the courts' burden.

THE PERSONAL INJURY MEDIATION PROJECT

The British Columbia International Commercial Arbitration Centre's pilot project to offer mediation or arbitration to people claiming damages for motor vehicle accident injuries seems to have promise.

In its first year of operation, 146 referrals were received; 54 mediation hearings were scheduled and 49 had been completed. Of the 49, 42 settled during mediation; five were still in progress at the time statistics were compiled, and two had gone on to trial. All cases so far have been by way of mediation and not arbitration.

⁹ A.J. Pirie, 'Proposal: Expert-Assisted Negotiation Conferences for Motor Vehicle Claims in British Columbia', memorandum written for the Justice Reform Committee (1988) at 1.



It is true that a similar rate of settlement can be expected from cases that never go to mediation. But a high percentage of these cases were referred to mediation when a judge was unavailable on the day of trial. In other words, these were among the small percentage of cases that had not settled and were destined for trial.¹⁰

The project has been operated under private contract with the BCICAC. The Insurance Corporation of British Columbia submits claims to the program and as the program has become more widely known, plaintiff's lawyers have also begun to submit cases.

ICBC's own criteria for referral of disputes are these:

- the case has been set for trial;
- injuries have stabilized;
- the investigation is predominately completed;
- negotiations have broken down; and
- the difference in amount claimed and amount offered must be more than \$5,000. (This means that relatively minor claims will not be submitted to the program because where amounts are very small the difference is unlikely to be more than \$5,000.)

ICBC reported in its submission to the committee that the average wait for a mediation hearing is three months and the average mediation time required is three and a half hours. The example is cited of a case that was settled for \$250,000 at a cost of \$1,275 for seven hours of mediation time. The case had been set for 10 days of trial time. Not only legal fees were saved but also the expense of calling witnesses.

Prior to the mediation hearing each party prepares a one or two page statement of the issues in dispute and his or her position on the issues. Oral evidence is not encouraged but the mediator may allow it. No record is kept. If a settlement is reached it is put into a written agreement. If there is no agreement, the parties still have the right to a trial.

In cases that do go on to trial after mediation has failed to produce agreement, the hope is that the issues will be narrowed and the necessary trial time considerably shortened.

¹⁰ It is also true that a high percentage of those cases that are 'bumped' from the trial list because there is no judge available, also settle. There is no way of knowing whether those litigants were satisfied with their settlement or whether they agreed out of frustration at waiting several months for another trial date.



ICBC has concluded its pilot project phase and has agreed to continue its participation and to develop internal corporate procedures to promote use of the program. A permanent 'Manager for ADR' has now been appointed. The program charges \$450 per party for four hours' mediation time with a trained mediator and for the Centre's administrative expenses. Parties pay their own counsel fees. The Centre's project now has expanded beyond motor vehicle cases to include all commercial disputes.

Unlike many of the American projects that the committee studied, the BCICAC project and other similar mediation programs are purely voluntary and can be seen as an extension of the kind of negotiations which now take place. The main difficulty seems to be a lack of awareness of their existence, among both the general public and the legal profession.

RECOMMENDATION 140

Judges should be encouraged to raise at pre-trial conferences the possibility of referring the issue of the amount of damages, if not liability, to mediation.

RECOMMENDATION 141

The Law Foundation should give careful consideration to funding any proposals for the communication of information about mediation of personal injury claims to the public. If more people are aware of that as an option, more people will insist that their lawyers at least explore the possibility of mediation with them before proceeding with litigation.

RECOMMENDATION 142

The Professional Legal Training Course and Continuing Legal Education should include in their programs information about mediation so that lawyers may become more aware of its availability, particularly in personal injury cases, and its features.



ADR in Complex Litigation

Because it allows for involvement of people with training and experience in the subject matter of the litigation, ADR techniques can be effective for the settling of technical, factual issues. Experts in the field in question are often chosen as arbitrators, for example. The flexibility of ADR solutions may be more likely to lead to the resolution of commercial disputes and multi-party lawsuits.

(This chapter will not discuss the case management techniques, such as Settlement Conferences, which can be seen as another facet of ADR, because they are discussed in the context of Pre-Trial Case Management.)

A number of techniques, especially tailored to the needs of complex cases, have been developed in the United States. The United States Army Corps of Engineers, for example, has developed a procedure called the Mini-Trial (not the same as B.C.'s mini-trial) which it has successfully used in several multi-million dollar disputes.¹¹ This technique is growing in popularity and is built into many contracts.

The Mini-Trial uses a closely structured timetable for preparation and presentation of the parties' cases. At the appointed time and place, a neutral person who is familiar with the type of dispute will sit with a representative of each party who is authorized to settle but who has not been directly involved in the dispute. These three listen as each party presents its case. No interruptions are permitted and no formal rules of evidence apply. Then the two representatives and the neutral third party retire and try to reach a settlement.¹²

In Washington State, Settlement Conferences are held in all complex construction cases. If that does not produce a settlement the case automatically goes to mediation. The court maintains a list of experienced litigators who will serve as mediators, arbitrators and special masters.

At the mediation conference, the lawyers who are primarily responsible for the file must be present and representatives of their clients, with full authority to settle, must be available. First there is a joint session, followed by private meetings between the mediator and each party. If no settlement is reached the mediator's conclusions may, with the consent of the parties, be conveyed to the judge.

¹¹ American Bar Association Standing Committee on Dispute Resolution, *Dispute Resolution*, Quarterly Information Update (Summer 1987).

¹² Submission of the B.C. Arbitration and Mediation Institute to the Justice Reform Committee.



Furthermore, the mediator must discuss with counsel the desirability of appointing a special master or arbitrator.

The Justice Reform Committee does not favour imposing any of these techniques on any class of case. However, these techniques do respond to the special requirements of certain kinds of cases which represent a considerable drain on judicial resources. A complex construction case can easily take many weeks of trial time.

Counsel should be always vigilant for that stage in a proceeding when a Settlement Conference or a referral to a mediator might result in resolution of the dispute. When that opportunity arises, counsel must be sure to have the people on hand who have the authority to settle the claim.

RECOMMENDATION 143

It is the responsibility of every lawyer to consider, at every stage of a lawsuit, those alternate dispute resolution techniques that offer the best prospect of settling the claim and to take advantage of them wherever appropriate. Law schools, Professional Legal Training Course and Continuing Legal Education should emphasize the importance of that responsibility in their courses.

New York's Center for Public Resources has developed and promoted an ADR Corporate Policy Statement. Many of the nation's major corporations have adopted a policy to seriously investigate ADR in any dispute with another company that has also adopted the policy statement. The idea is that if ADR can be explored before the litigation process is set in motion and takes on a life of its own, there is much to be gained.

In British Columbia, the provincial government's Purchasing Commission now uses the BCICAC's model arbitration clause in all its purchase orders - about 30,000 contracts annually. B.C. Buildings Corporation is using the clause in its new and renewed rental agreements and has incorporated the Centre's arbitration rules in major contracts.



RECOMMENDATION 144

Lawyers who draft contractual agreements should address their minds at that time to the most appropriate means of resolving disputes that may arise, keeping in mind the variety of Alternative Dispute Resolution techniques available.

ADR Techniques in Small Civil Claims

THE VICTORIA PROJECT

Victoria's newly-created Dispute Resolution Centre provides a community-based service for minor civil disputes. It is a two-year pilot project which is nearing the end of its first year of operation.

It is staffed by a Project Director with volunteers from among the students of the Faculty of Law and School of Social Work at University of Victoria and from the community at large. The project operates in conjunction with a credit course in Dispute Resolution at the law school.

The project aims to provide a low cost service that will be less intimidating than the court system. In its first six months of operation it received 207 referrals and every one of the cases mediated at the Centre has resulted in a signed agreement. These included about 20 cases referred from Small Claims Court.

NEW YORK

New York has community dispute resolution centres in 53 counties and will soon have them in all 62. They are a permanent part of the state's Unified Court System. Services are provided by independently operated non-profit agencies under contract. The centres are financed by the state and local governments and other state agencies, private donations and grants, training income, fund raising events and contributions in kind. No fees are charged to clients. In the year ending March, 1986, the centres handled 77,000 contacts and 17,500 of those resulted in mediations, 3,000 in conciliation without mediation, and 450 in arbitrations.



Files include potentially criminal matters such as assault, and civil cases such as breach of contract, and violation of local ordinances. Their reported compliance rate is 78%.

BETTER BUSINESS BUREAU

When complaints are referred to the Better Business Bureau and cannot be resolved by normal merchant-customer contact, the Bureau will act as a neutral and provide a mediator to seek a satisfactory settlement.

A formal arbitration process is also available if mediation is unsuccessful or inappropriate.

These examples illustrate the potential for community-based dispute resolution projects to deal with cases which do not, by reason of what is at stake, merit taking to court.

RECOMMENDATION 145

Every encouragement should be given to community-based projects which provide alternatives to the court system for claims involving small sums of money and appropriate issues.

TRAINING AND PROFESSIONAL STANDARDS

Many of those who addressed the Justice Reform Committee on the subject of ADR stressed the need for proper training of sufficient numbers of mediators and arbitrators. Professional standards and codes of ethics were also discussed. Currently there are no mandatory standards, restrictions, training or licensing procedures for mediators or arbitrators, except for the Law Society's requirements for Family Law Mediators.

The Justice Institute of British Columbia's Centre for Conflict Resolution Training provides the most extensive training in the field of mediation in Canada.

The B.C. International Commercial Arbitration Centre co-sponsors seminars with Continuing Legal Education, the Justice Institute, and



others. The Centre's view is that mediation training is quite highly developed in B.C. but arbitration training is deficient.¹³

The B.C. Arbitration and Mediation Institute has organized seminars for potential arbitrators and participates in Continuing Legal Education and other seminars. About 75 people have passed the Institute's two-day training seminars, including accountants, engineers, insurance executives, quantity surveyors, real estate agents and lawyers.

The University of British Columbia and the University of Victoria law schools this year both offer sources in ADR and UBC has had a course in international commercial arbitration for three years. Sixteen judges have taken a mediation training program offered by the Justice Institute and others have attended related Continuing Legal Education programs.

What is needed at this point is a carefully developed set of standards for training programs and a certification procedure for ADR professionals. The new centre for alternate dispute resolution at the University of British Columbia would be the appropriate institution to co-ordinate efforts in this direction and to undertake the necessary research.

RECOMMENDATION 146

The centre for alternate dispute resolution at the University of British Columbia should be encouraged to develop a set of standards for training of ADR professionals and to work towards a set of professional standards and a system of certification.

¹³ International Commercial Arbitration Foundation of B.C., *Trustees Report*, Second Annual General Meeting, June 22, 1988.



JUSTICE REQUIREMENTS OF PARTICULAR GROUPS

Justice is open to all - like the Ritz Hotel.¹

The Disadvantaged

Access to the justice system has been a primary concern to the Justice Reform Committee. In its public hearings the Committee learned of the particular barriers that deny or restrict that access for many people in this Province.

The Committee heard from those who work with the mentally ill and from patients themselves. If they are involuntarily committed to an institution they have the same problems that prisoners do but without the same protections.

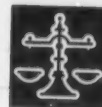
Mentally handicapped people and those who work with them described the frustration of a person who struggles to make himself understood by a police officer or lawyer or judge.

Volunteers who run transition homes for battered wives described the problems those women face when they turn to the courts for help.

Running throughout so many of these issues of access for the disadvantaged is a common thread: poverty. Unfortunately, poverty is often a side effect of so many other conditions - mental illness; physical disability; single parenthood, for example.

The problems that poor people bring to the courts are few. Poor people do not ask for legal remedies for most of their legal problems.

¹ The phrase is most often attributed to Mathew L.J. according to Megarry, *Miscellany at Law* (London: Stevens and Sons, 1955), at 254.



Often they do not have the information to allow them to recognize a problem as one that the legal system can address. If they recognize the problem they may not know how to find legal advice. Of course if they find it, they are unlikely to be able to afford to pay for it.

The *Charter of Rights and Freedoms* offers important protections to members of disadvantaged groups in society. But these people must be able to participate in the process of defining and enforcing those Charter rights. This kind of litigation can be so expensive as to be out of reach for most people.

RECOMMENDATION 147

Disadvantaged groups in society should have access to funding which will allow them to define and enforce their rights under the Charter of Rights and Freedoms in respect of provincial legislation, in the same way that is available in respect of federal legislation.

In the course of considering improvements to all aspects of the justice system, the Committee has kept a watchful eye on the impact these changes could have for those of limited and even average means. The members recognize that any improvements to the justice system that will increase its cost to those who need it most cannot be justified.

A final measure of the worth of any justice system will be in the service it provides to the poor and to the least powerful members of society.

The Justice Reform Committee believes that all of the improvements that have been recommended in this report will enhance access to the justice system for all British Columbians and will have particular benefit for those who are disadvantaged.



PHYSICALLY DISABLED

The Committee was told of older court facilities that still do not have access for the physically disabled and for wheelchairs in particular.

RECOMMENDATION 148

Courthouses and buildings that house courtrooms, registries, Legal Aid offices, police, Crown Counsel, courtworkers and counsellors, and law libraries should be upgraded to allow access by the physically disabled.

HEARING IMPAIRED

The hard of hearing have particular problems when they are involved in court proceedings. There is a shortage of qualified court interpreters for the deaf.

Technology is available which can provide near-simultaneous transcript of court proceedings on a computer monitor in the courtroom. The technology has been developed principally for other purposes but it could be an invaluable aid to the hearing impaired in the courtroom. (This topic is dealt with in the Technology Chapter.)

RECOMMENDATION 149

Educational programs aimed at producing qualified court interpreters for the hearing impaired should be supported.

RECOMMENDATION 150

Any new computer-assisted court-reporting technology that is adopted for recording purposes should be considered from the point of view of possible benefit for the hard of hearing in the courtroom.



MENTAL PATIENTS

The Committee heard from several sources that the Mental Patients Advocate Project needed a second lawyer in order to provide service across the Province. The Law Foundation has now provided funding for that position.

There were also concerns about the inadequacy of the Legal Aid tariff and these have been addressed later in this chapter.

The Committee believes that mental patients and their next of kin should be informed of their rights and options under the *Mental Health Act*. Hospital staff are likely in the best position to give out that information. The regulation under the *Mental Health Act* requires that a copy of the regulation and a copy of the section of the Act that sets out how long a person can be detained, must be posted in a conspicuous place in the hospital. The Committee believes, however, that merely posting the Act and the regulation will not be enough to communicate real information.

RECOMMENDATION 151

Those who are involuntarily admitted to mental health facilities need information about their rights with respect to their detention. This information must be communicated to them in a meaningful way. The Ministry of Health should determine where that responsibility should rest.

The Committee also heard a great deal about the rights of patients and their families to participate in decisions about their treatment program. The Committee considers this an important question but one that it is not equipped to pursue.

RECOMMENDATION 152

The Ethics Committee appointed by the Ministry of Health should study the rights of patients under the *Mental Health Act*, and their families, to participate in decisions about their course of treatment and recommend a policy to the Minister of Health.



MENTALLY DISABLED

When a mentally disabled person comes into contact with law enforcement, the Committee heard, there needs to be someone who can assess whether the person understands his or her rights and what is taking place.

The Vancouver Police Department has for ten years operated a unique program that meets that need. 'Car 87' is a team of a police constable and a psychiatric nurse who work a ten-hour shift each Wednesday through Sunday night. They respond to calls from other police units, mental health units, and from neighbours or family members who report psychiatric emergencies. They are thoroughly familiar with the Mental Health Act. Although they do have admitting powers under the Act their goal is to avoid admissions where possible. 'Car 86' is a similar program, operating with a police officer and a social worker.

The Committee commends the Vancouver Police Department and the Greater Vancouver Mental Health Services for the Car 86 and Car 87 programs.

As the planned decentralization of psychiatric facilities goes ahead there is likely to be an expanding need for services such as these in many communities.

COMMUNICATION WITH DISADVANTAGED PEOPLE

Recent immigrants whose first language is not English; mentally handicapped people; the emotionally disturbed; the illiterate; and the uneducated all have a common need. They need information about the justice system in terms that they can understand.

For some, that may mean the materials now available only need to be translated into another language. For others, they must be presented in simplified terms. For others, written material will never be adequate.

But with today's technology there are many alternatives to written materials. Video and audiotapes are commonplace, for example. Interactive computer programs may also have a role to play. All of these options, together with the traditional pamphlets, posters and charts should be fully explored. Whatever materials are used they



should be presented in a format that is attractive to the intended audience and in a way that they can relate to it.

The Committee commends the many efforts in this direction by the Law Foundation, Legal Services Society, Public Legal Education Society and others.

RECOMMENDATION 153

Increased efforts should be made by all those engaged in the production of legal information materials to communicate with British Columbians who for any reason cannot take advantage of the materials now available. As new opportunities become available, they should be taken advantage of to tailor methods of communication to the particular needs of disadvantaged groups in society.



Native People

Native groups spoke about the cultural barriers that have alienated them from the Canadian justice system. For many natives, Canadian justice can seem like a foreign system, imposing a value system which is at odds with their own culture. This conflict poses problems that non-natives do not experience.

As well, they are often poor. Some live in parts of the Province that are not easily reached by public transportation or even by telephone.

The Native Courtworker program is an attempt to bridge the gap between Natives and the justice system. It has operated since 1975 and has had much success. It is staffed by five supervisors, 34 courtworkers, two prison liaison workers and two alcohol and drug counsellors.

All the employees of the program are native people; none are lawyers. The program is funded by the Ministry of the Attorney General at a cost of \$1.4 million annually. The alcohol and drug counsellors are separately funded by the Ministry of Health. The principal goals of the program are to give native people information and advice about their rights and responsibilities before the law and to provide counselling to native people in confrontation with the law.

The Legal Services Society has a Native Programs Branch which funds a number of community-based native law offices and develops specialized pamphlets on areas of particular interest such as labour law on reserves and child apprehension. However, there are still many native people in the Province who do not have access to these services.

RECOMMENDATION 154

Government and other appropriate agencies should expand support to the Native Courtworker Program to make it more widely available to Native people in the Province, and in particular to provide for Native Courtworker services in Family Court to deal with child apprehensions.

The concept of an aboriginal justice system was presented to the Committee as one that is receiving a great deal of interest and



attention. However, the Committee favours a mainstream justice system for all British Columbians which serves the needs of all of the people of this Province. At the same time, it is recognized that Native People have traditional values and customary ways that the justice system can and should accommodate. Native People tend to resolve disputes through mediation or conciliation: bringing the community together. There is much scope for this approach within the present justice system.

In a child custody case recently, a Provincial Court Judge called on Tribal Elders to consider the matter in their customary way and give a report to the Judge. The Judge then incorporated their recommendation into his Order. The Committee is very encouraged by this approach which recognizes the validity of traditional values in the Native community.

Diversion programs³ offer another opportunity to accommodate Native values within the existing justice system. Native groups should be encouraged to develop their own diversion programs to assist native people in trouble with the law.

Family problems are an area in which native people often say they are misunderstood and mistreated. The value of mediation and counselling in family situations is being reaffirmed everywhere and native people particularly should be encouraged to take advantage of the resources that exist.

For native people who live in remote areas, the justice system can seem particularly remote and foreign. There have been experiments with holding Provincial Court sittings on reserves and this should be continued and extended. It could enhance understanding of the justice system among the native community and it could be an educational experience for the judges and lawyers as well.

RECOMMENDATION 155

Native communities should be encouraged to develop their own diversion programs and be supported in this endeavour by those with the responsibility of leadership in the justice system.

³ See the chapter on Criminal Law & Procedure.



RECOMMENDATION 156

Mediation and counselling services should be made available to Native people who encounter family problems and those people should be made fully aware of the services that do exist.

RECOMMENDATION 157

The Chief Judge of the Provincial Court should be encouraged to arrange for sittings of the Court on Indian Reserves whenever possible, particularly in remote areas, and wherever it could help foster greater understanding.

The Committee heard of the lack of confidence that aboriginal people have in the Canadian justice system. However, there is an encouraging trend toward increasing numbers of aboriginal lawyers and judges working within the system. In 1973 there were four law school graduates in Canada of aboriginal ancestry; today there are 114. This number will be translated in time into more Native judges as well. As the numbers of lawyers increase, there will be a greater pool of qualified people from which to draw appointments to the Bench.

NATIVES AND THE CRIMINAL JUSTICE SYSTEM

Unquestionably, a disproportionate number of native people are in conflict with the criminal law. This poses serious problems for the justice system. The critical issue is the system's ability to balance the needs of Native People with those of the remainder of the population. In many respects this is a national problem, but there are initiatives that can be taken at the provincial level.

The Provincial Government, likely through the Ministry of the Solicitor General, should assume a leadership role in assessing what those initiatives might be and then moving toward their implementation. That process of course must include participation by representatives of Native organizations.



As a starting point, the Committee suggests consideration of the recommendations contained in Chapter 15 of the 1988 Report of the Standing Committee on Justice and the Solicitor General entitled, 'Taking Responsibility'. Those recommendations include:

- Emphasis on programs offering alternatives to imprisonment to Native offenders, operated where possible by Native People;
- Development and delivery of institutional programs in a way that is sensitive to the needs of Native inmates, delivered where possible by Native instructors;
- Sensitivity training for non-Natives involved in delivery of programs to native inmates;
- Recognition of native spirituality similar to that accorded other religions; and
- Assistance in preparing release plans, including release to home communities or reserves where appropriate.

RECOMMENDATION 158

The Solicitor General should consider and adopt where appropriate, the recommendations respecting Native Offenders in the 1988 Report of the Standing Committee on Justice (The Daubney Report).



Legal Aid

The recommendations of the 1984 British Columbia Task Force on Public Legal Services urgently require implementation.

It perhaps should not be surprising if our legal system falls short of providing equal access to all citizens. Our system of justice has been evolving for centuries and only in the last 30 years have we attempted to make it available to all.⁴ Nonetheless, in today's society it is no longer acceptable that the legal system be at the service only of those who can afford to use it.

There is much dissatisfaction among the people of British Columbia with this state of affairs. The large volume of complaints about the inadequacy of the Legal Aid system in this Province attests to the serious concern that exists in the community, with this aspect of the justice system.

The comments were almost unanimous in calling for immediate fulfillment of the recommendations of the 1984 Task Force on Public Legal Services.

Native people

The committee heard a great deal about difficulties encountered by members of the native communities in obtaining Legal Aid services. An Indian Friendship Society told the committee this:

Approximately 20% of people seeking legal aid in this province are of native ancestry. On a demographic basis native people are disproportionately in conflict with the law and are serving more time in penal institutions, yet only 4.64% of the Legal Services Society budget is allocated to the Native Programs. Many native communities in rural areas have no access to legal aid or information.

Requests have been made for greater representation on the Legal Services Society Board. The Committee notes that a second person of native ancestry is about to be appointed to the Board and applauds that trend. Full adoption of the Task Force recommendations will go a long way towards meeting the other concerns that were expressed to the committee by native people.

⁴ Hon. W. Z. Estey, *Who Needs Courts?*, Windsor Yearbook of Access to Justice (1981), p.263 at 269.



ALTERNATE DISPUTE RESOLUTION

Another chapter of this report discusses trends towards means of resolving disputes outside of the court system. It was pointed out to the committee that because the Legal Aid tariff does not include an item for mediation it fails to encourage negotiation and settlement of disputes as fully as it could. (This applies only in the civil context and particularly in relation to family matters.)

THE PROPOSAL

There have been recent improvements in the level of funding for Legal Aid, notably in the areas of maintenance enforcement, increased family law coverage, and the provision of funding of legal aid from offices in Cranbrook, Terrace and Maple Ridge.

The committee now urges that sufficient funding be made available, principally by government, to make possible full implementation of the 1984 recommendations at an early date. If it cannot be done immediately then a timetable should be fixed and a commitment made to meet the goals set by that Task Force within that timeframe. At the very outside, we would urge that the timetable not extend beyond this and the next two fiscal years of government.

The committee recommends also that the Legal Services Society consider adopting a tariff item for mediation.

Recognition must be given to the worthy contribution made by practising members of the Bar of this province who provide legal services to those who cannot pay. This contribution comes through services rendered under the existing Legal Aid tariff and also through the many cases, both criminal and civil, that are taken without fee. These services are worth many millions of dollars per year.

RECOMMENDATION 159

The recommendations of the 1984 British Columbia Task Force on Public Legal Services must be fully implemented.



TECHNOLOGY & THE JUSTICE SYSTEM

New Possibilities

Many times during the course of the committee's work, members were surprised to find that the issues they were discussing had been examined and debated 10 years ago, or 40, or even a hundred years ago. The theme of expeditious justice goes back as long as there have been courts in the Common Law world. The one thing that is new to this round of justice reform is technology.

In the last decade, technology has advanced so rapidly that its potential impact on so conservative an institution as the court system today can only be guessed at. The subject went almost unmentioned by those who spoke and wrote to the committee. Yet as the committee members began to read of developments elsewhere and especially of experimental projects - some now well established - in the United States, it became obvious that this is an area that British Columbia cannot afford to leave unexplored.

This committee can has attempted to highlight those areas where it feels that technology may have a significant role to play.

Daily Operations

Certain functions are essential to the day to day operation of a courthouse, such as accounting, personnel records, preparation of daily court lists and recording adjournments, guilty pleas, acquittals and judgments. These are all functions that lend themselves to computerization and in fact, in most court systems, this is where computerization begins and ends.



Control and Monitoring

Evaluation has become a central focus of successful management in all types of organization. The key to evaluation is a set of standards against which performance can be measured. A properly designed information system for a court would provide a variety of reports:

- Status reports showing numbers of pending cases, by classification;
- Aging lists, classifying cases from oldest to newest or flagging those cases which have crossed certain time limits;
- Case inventories giving total numbers of cases by major category; and
- The number of cases disposed of within a certain period and their categories, compared with the number of new cases filed in the same period.

Proper case flow management¹ would ensure that cases are heard within a reasonable period of time, given the particular type of case. This type of monitoring focuses on exceptions, identifying areas which are not under control and flagging the source of the problem.

In July this year there was prepared for the Ministry of the Attorney General, a 'General Requirement Study for the Supreme and County Civil Courts' proposing a plan for computerization of various functions in the Supreme and County Courts at Vancouver.

The committee endorses the concept contained in that study, of computerizing trial scheduling functions and civil case document control. Part of the implementation of this system must be a well designed management information system.

RECOMMENDATION 160

A carefully designed Management Information System is essential for monitoring the functioning of the court system and for measuring the success or failure of procedural reforms throughout the Province.

A vitally important part of any attempt at procedural reform is a monitoring system that can measure the effect of whatever changes are

¹ This is not to be confused with 'case management' which has to do with the conduct of a particular case.



made. In that way successful programs can be continued or expanded, necessary adjustments can be made, and unsuccessful attempts at reform can be quickly rejected or improved.

Implementation of a computerized system in Vancouver should include consideration of ways in which adequate data can be collected from registries throughout the Province.

Planning

The next step is planning for future needs. Information about the present allows the system to project future demands and to manage resources to meet those demands. For example, analysis of recent performance may show that a particular type of case takes an average of three weeks of trial time, and that the settlement rate for those cases is 85 per cent. If the information system shows a given volume of that type of case being filed each month, it is possible to predict the demand for judicial time to hear those cases a year or two down the road.

RECOMMENDATION 161

A properly designed Management Information System would permit the development of standards and models for the various types of cases handled by the Courts. These would provide a basis for forecasting future demand and management of resources to meet those demands.²

Public Accountability

A properly designed management information system can provide government and the public with full information on the performance of the court system in terms of processing cases.

² D.A. Sipes, *et al.*, *On Trial* (Williamsburg: National Center for State Courts, 1988).



Electronic Filing

The courthouse at 800 Smithe Street in Vancouver is, to a large extent, a very expensive warehouse facility. A major portion of the main floor of the courthouse is given over to document storage. There are as well, other storage areas in Vancouver and throughout the province which also store court documents. Every piece of paper that is filed in every case is stored there whether anyone will ever need to refer to it or not. It becomes cumbersome to gain access to the files: a staff member has to respond to requests by retrieving the files from storage and handing them over the counter. In Vancouver at least, this now only can be done at certain times of the day because of other demands on staff. It is also not at all secure. Documents are shuffled as files are searched manually in the courthouse and there is no way of knowing whether documents disappear from files in that way.

The technology now exists that would allow for electronic storage of these documents. Space that now stores paper files could be transformed into courtroom space or other offices. Another advantage to such a system would be that files would then be instantly accessible to judges in their private chambers exercising case management functions; to judges hearing Chambers applications; and to the public and the Bar by means of a dial-up system.

RECOMMENDATION 162

The feasibility of a complete electronic filing system to replace the present paper filing system in the Court Registry should be studied. Such a system would store documents which are now filed in the courthouse, in a computerized electronic database so that each file could be searched by remote terminal.

RECOMMENDATION 163

There should be a detailed study of the documents now required to be filed in the course of litigation with a view to eliminating the filing of unnecessary forms, and improving present forms if possible.



Public Access to Computer Stored Information

This would be a logical extension of an electronic document storage system. It is in place in some American jurisdictions and generates revenue for government while saving expense for the bar and the public.

DATABASE SEARCHING AND RETRIEVAL

GOVERNMENT DATABASES

Government has a number of computer databases which have the potential to reduce costs to the public for searches: the Company's Office, Central Registry, Motor Vehicle Registry and Land Title Office, for example.

If government were to offer access to these databases by remote computer terminal, at a reasonable fee, there could be a significant reduction in cost to many clients who now pay agents to search these databases. Also, there would be revenue to government.

RECOMMENDATION 164

Government should consider the types of information now contained in government databases which would be of interest and use to the public and the Bar with a view to allowing public access to that information through a user-pay dial-up system.

CENTRAL JUDGMENT REGISTRY

A person who pursues a claim through the litigation process and finally wins a case at trial becomes very disillusioned with the justice system when that Order is ignored by the unsuccessful party and the court seems to offer little assistance in enforcing its own order.

The recent steps taken by the Provincial Government in the enforcement of family maintenance orders should be applauded. That system could and should be expanded to provide a central judgment registry for all judgments of the court as one means of assisting in enforcement. Such a database, coupled with the Land Title Office, Central Registry and others would go a long way towards providing the



tools necessary for an efficient, quick and effective enforcement procedure. That in turn would bolster public confidence in the justice system.

RECOMMENDATION 165

A Central Judgment Registry should be created as a means of facilitating the enforcement of judgments of the courts.

CASE PROFILES

The information about individual Supreme and County Court cases that is now obtained by doing a physical search of the file at the courthouse - the names of all parties who have filed an Appearance, for example - could be obtained by remote computer access. As was mentioned above, this could save money for clients and generate revenue for government.

FAMILY LAW DATABASE

The implementation of the committee's proposal to put all family law cases within Supreme Court registry system would mean a single file for each couple throughout the court process. This will require development of a computer database which mirrors the federal divorce registry system.

DECISION DATABASE

Throughout the province, Supreme and County Court judges' secretaries type Judgments of the court which are filed with the court registry. Those judgments are then provided to commercial publishers who reproduce them and publish them to the legal profession for profit. The technology is readily available to capture the word processing file which is produced by the judges' secretary³ which could then be searched in exactly the same way that the current British Columbia Judgment Database is accessible through Quick Law. This would be another revenue source for government.

³ It is true that many judges secretaries are still using typewriters but there is an inevitable trend to use of word processors.



RECOMMENDATION 166

A decision database should be created in the court system, making use of the decisions of the courts that are typed by the judges' secretaries and filed in the court. Cases would be accessible to judges, the public and the Bar by remote terminal and would generate revenue for government.

In order to accomplish this, all judges' secretaries would have to be furnished with compatible word processing equipment.

LAND TITLES PROJECT

The Director of Land Titles has undertaken two initiatives to simplify conveyancing procedures.

The first is to make available to the public and the Bar, by remote access terminal, the computer records of the seven land titles offices. This means that title searches will be available by remote access within the next few months. All indexes and documents on file are scheduled to be available within three years. When searches can be done from lawyers' offices, the expense to clients will be reduced significantly.

The second initiative is the development of a one-page, machine readable mortgage document. The document would contain all the essential terms of the mortgage agreement and would incorporate all the other terms by reference either to statute or to another document. If the document is readable by an optical character reader (scanning device), registrations could be accomplished almost instantaneously.

RECOMMENDATION 167

The committee applauds the initiative of the Director of Land Titles in attempting to simplify conveyancing practice and recommends that the project be completed as quickly as possible.

GENERAL

The committee suggests that the scope of the General Requirement Study mentioned earlier be broadened to encompass the issues that have



been raised in this report. That can perhaps best be accomplished by input from the various user groups: the public, the bench, the bar, and government.

RECOMMENDATION 168

A steering committee should be established with broad terms of reference to co-ordinate the application of computers, management informations systems and other technology to the justice system. The committee should consist of representation from the Bench, the Bar the Ministry of the Attorney General, and the public.

Court Reporting Services

THE PROBLEM

The cost of transcripts is one of the largest single expenses in the litigation process.

All trials in the Supreme and County Courts and all Examinations for Discovery, as well as some other proceedings, are recorded by Official Court Reporters. Traditionally, a verbatim record of the proceedings is taken down on a stenotype machine. Then, if a transcript is ordered by the judge or by one of the parties, the reporter dictates the record from the paper tape produced by the stenotype machine. A dictatypist prepares the transcript which is edited by the reporter and a final version results.

Court reporters charge \$35.00 per hour to attend at an examination for discovery: the charge for the transcript and one copy is \$2.75 per page; \$3.60 per page on an expedited basis and \$4.05 per page on a daily basis.

Reporters at trial are paid \$200 to \$250 per day to transcribe the proceedings before the court. They do not prepare a transcript unless one is ordered. Trial transcripts cost \$4.50 per page (for the original and one copy); or \$5.50 on an expedited basis; and \$6.25 on a daily basis. The same rate is charged for exhibits which require nothing more than photocopying documents produced at trial. An average day at trial will produce about 100 pages of transcript. In



both trials and examinations for discovery, subsequent copies ordered by other parties are charged at a lower rate.

Transcripts are required for appeals. Daily transcripts may be required by counsel in long trials and in trials lasting more than 10 days they are commonly required by the judge. When the judge requests them they are paid for by the plaintiff.

A small number of reporters are government employees - about 20 at the Vancouver courthouse. The rest are on contract. Many of the contracted reporters are guaranteed a certain number of days a month for which they are paid a daily rate of \$250 (for a reporter with five years' experience). That reporter can sub-contract a day's work to a less experienced reporter for \$200, pocket \$50, and be available for more lucrative work such as examinations for discovery. The result is that the work is done by a less experienced reporter and, if it is an ongoing trial, there is one more person involved.

One recent incident illustrates the problems this causes. A lawyer was preparing an appeal on behalf of a client who had been convicted of a criminal offence after a long trial. When he asked the Official Court Reporters office for transcripts from the trial he was sent a schedule listing the 40 different reporters who had been involved in the case. His office then had the task of obtaining telephone numbers for all 40 and trying to locate them. Three had moved to the United States and a great deal of time was spent trying to locate the remainder.

In sentence appeals, it sometimes takes the reporter so long to prepare the transcript of the sentencing that the person actually serves the entire sentence while waiting for the transcript.

The committee was told of cases now in the system in which court reporters have lost their notes or refused to surrender them, refused to prepare transcripts or left the province.

In three cases now before the Court of Appeal the Crown has been waiting for transcripts and Appeal Books which were ordered more than a year ago and the accused have been kept in custody while waiting for their appeal.

There are no adequate standards for court reporters to meet. The sole criteria for designation as an Official Court Reporter is the ability to report at the rate of 200 words per minute.

The contract does not provide for effective management of contract reporters and no effective disciplinary measures are available with respect to them. This results in problems such as lateness for court



assignments: it is particularly difficult to ensure attendance at any trial starting before 10:00 a.m., the committee was told.

Despite these difficulties, many court reporters are dedicated and conscientious in the performance of this vital role in the court process. Regretfully, in the committee's view, the overall situation requires action to protect the public interest.

THE PROPOSAL

The committee recommends approaching these problems from two perspectives: amending the regulations to ensure better control over the people; and taking advantage of modern technology to drastically reduce the cost of transcripts and improve service.

All court reporters should be under the control of a senior management person, described as a Chief Court Reporter or some similar designation, who would have responsibility for:

- assignment of reporters to courtrooms;
- discipline of court reporters when necessary and in particular for suspension of any court reporter who has unduly delayed the delivery of transcripts until such transcripts are provided;
- ensuring a level of continuity in the reporting of court proceedings that properly serves the public;
- ensuring that reporters are present in courtrooms at whatever time they are required; and
- providing access to court files after normal business hours so that reporters can produce their transcripts from the day in court.

This approach would require an amendment of the Regulations under the Supreme Court Act, which are incorporated in the terms of the court reporters' contracts.

RECOMMENDATION 169

A senior management person should be given responsibility for ensuring the appropriate level of service by Official Court Reporters and the terms of the contracts entered into should allow for proper management.



The technology now exists which can eliminate the problem of delay in the production of transcripts, cut their cost significantly, and do away with the need for appeal books entirely. Furthermore, it can ease the burden on the trial judge who must make a decision relying on the notes made at trial (in ordinary cases where daily transcripts are not ordered.)

This technology is called Computer Aided Transcription.

A normal court reporter's stenotype machine is linked to a computer that translates the code directly into word processing text. This can be edited easily and a final text produced usually within an hour or two for a day's court proceeding.

The computer-readable diskette can be filed with the court so that it is available to the judge immediately. The judge or the lawyer can use transcript retrieval software to search, annotate and index the transcript instantly.

Many court reporters now have the equipment necessary to produce transcripts in computer-readable form. Probably half of those now working in the courts offer transcripts on diskette at nominal cost when ordered together with the paper copy at full price. The contracts which the government holds with court reporters should be renegotiated as they come up for renewal to require that they use equipment which can produce transcripts in the required format.

RECOMMENDATION 170

Court reporter contracts for attendance in the Supreme or County Courts on a daily basis should require the reporter to provide the court and counsel with a transcript in computer readable form.

The expectation is that this would result in significant cost savings for litigants.

Such a contract would no doubt require negotiation of changes in the pay structure to recognize the costs of editing the transcript into final form but which would avoid the costs associated with production of printed transcripts.

The initial benefit of this would be that the trial judge, in rendering a decision, would have ready access to a complete transcript of the proceedings. During the hearing itself the judge would be relieved of the duty to make detailed notes and allow him or her to concentrate on the witnesses and the proceedings generally.



The most significant cost savings for litigants would be achieved at the appellate level. Appeal books, which consist of transcripts of the trial, are extremely costly. They would become unnecessary because the court would have access to the entire transcript by computer. Preparation of factums could begin immediately upon receipt of judgment.

RECOMMENDATION 171

The terms of the contracts that the government enters into with Official Court Reporters should be reviewed and renegotiated as those contracts expire, to address the problems that have been identified.

Computer Integrated Courtroom

The concept of the Computer Integrated Courtroom originated in the United States in the early 1980's with a series of projects often referred to as the 'Courtroom of the Future'. These projects were seen as futuristic a few years ago but today they represent tried and tested technology that is readily available.

What was new and unique was the combination of equipment in the environment of the courtroom where the most modern convenience often is the telephone on the clerk's desk.

The equipment includes:

- a Computer Assisted Transcription (CAT) compatible stenotype machine;
- a CAT computer capable of doing real time translation;
- a printer; and
- three computer terminals with hard disk drives.

A terminal is placed before the judge and one on each counsel table. The computer and printer are in an adjoining room. Data is transmitted through cables from the stenotype machine to the computer which translates the reporter's notes, stores them, and sends them back to the terminals in the courtroom. Besides the obvious advantages for those engaged in the conduct of trials, this system provides an excellent means of providing access to court for the hearing impaired. The person has before him an almost instantaneous written version of the proceedings appearing.



With this installation one reporter working alone can provide a rough transcript within minutes of the end of a session. If there is an operator in the adjoining room, the two working in tandem can produce real time translation. A display of the unedited transcript appears on the screens before counsel and the judge approximately five seconds after the evidence has been spoken.

The computer also allows for key word indexing and search and retrieval. With a telephone hookup there is added the capacity to do on line legal research through any of the database systems.

The cost to equip a courtroom with the necessary hardware and software is estimated at from \$35,000 to \$70,000.

RECOMMENDATION 172

A computer integrated courtroom should be established in Vancouver as a pilot project. After experience is gained with a variety of cases the project should be assessed and extended if appropriate to other courtrooms in Vancouver and throughout the province.

Facsimile Transmission

Facsimile transmission machines are being installed in offices across British Columbia at a rapid rate. Law offices now commonly use facsimile transmission to deliver letters, documents and pleadings. Our rules of Court, which were drafted when facsimile transmission did not exist, should be amended to reflect this reality.

RECOMMENDATION 173

The Supreme Court Rules should be amended to specifically provide for service of documents by facsimile transmission.

This machine also opens new possibilities for the court filing system. The Court of Appeal maintains registries in Vancouver and Victoria only. This means that the actual appeal period available to those in other parts of the province is reduced by the time that it takes to forward documents to Vancouver or Victoria for filing. The



alternative is to retain agents in Vancouver to prepare the documents and file them, which increases costs for the client.

If there were a facsimile machine in the Court of Appeal registry, documents from out of town could be filed almost instantaneously. This could be viewed as a pilot project to test the use of facsimile transmission for filing of court documents.

RECOMMENDATION 174

The Rules Committee should develop specific rules to deal with the widespread and expanding use of facsimile transmission equipment.

RECOMMENDATION 175

A facsimile machine should be located in the Court of Appeal Vancouver registry and interim rules devised to allow for the filing of Notices of Appeal and other appropriate appellate documents from outside Vancouver by means of the machine. This should be viewed as a pilot project to test the use of facsimile transmission for court filings generally.

The project should be limited to filings from outside Vancouver only to restrict the volume in the initial stages. If the program is successful, further machines could be installed and the program expanded to allow filings from within Vancouver as well. The full potential of this technology to reduce cost and delay must be explored.



STATUTORY AMENDMENTS

Many of the submissions and letters that came before the Justice Reform Committee called for amendments to various statutes. Some of these are outside the scope of this committee's inquiry. Others touch on subjects which are very much a part of the operation of the justice system but they require far more study than this committee could offer.

In other cases, the committee is able to recommend positive changes.

COUNTY COURT ACT

County Court Judges should have the same power to appoint a Special Referee, where appropriate, as do Justices of the Supreme Court.

RECOMMENDATION 176

The County Court Act should be amended to include the same provisions as s. 47 of the *Supreme Court Act*. This will make it clear that County Court Judges have the same authority as a Justice of the Supreme Court to order a reference to a Special Referee under Rule 32.

COURT ORDER INTEREST ACT

When a judge makes an order that one person pay a sum of money to another, interest begins to accumulate on that money until it is paid. The rate of post-judgment interest is set by federal statute, the *Interest Act (Canada)*. It is a low rate and it applies only to the four Western Provinces and the Territories.



The Province may pass laws regulating interest rates only where the Federal Government does not have legislation of its own. In 1981 the Federal Government announced its intention to repeal the relevant sections of the *Interest Act (Canada)* and so asked British Columbia to introduce provincial legislation to replace it.

British Columbia responded by passing the Court Order Interest Act 1982 which provides for a higher rate of interest. However, the Federal Government has not proceeded to repeal its legislation.

Representations were made to the committee asking that the Federal Government be encouraged to re-introduce its repealing statute at an early date, clearing the way for proclamation of the Court Order Interest Act, 1982. We believe that to be a reasonable request.

RECOMMENDATION 177

The Federal Government should be urged to promptly repeal the sections of the *Interest Act (Canada)* so that the *Court Order Interest Act 1982* may be proclaimed.

COURT RULES ACT

There are at least nine different statutes which give authority for the making of rules of practice and procedure before the courts of the province. There is also a Court Rules Act which sets out the procedure for rule making.

That Act authorizes the Lieutenant Governor in Council to make rules, on the recommendation of the Attorney General. The Attorney General is to make recommendations only after consultation with the Chief Justice or Chief Judge of the court involved.

This Act should be the one statute that contains the authority to make rules of practice and procedure. Other provisions in other statutes should be removed and replaced with a reference to the Court Rules Act. (Some of the other statutes that contain rule-making authority are the Supreme Court Act, the County Court Act, the Provincial Court Act, the Evidence Act, Family Relations Act and Infants Act.)

This move would eliminate redundancy and confusion.



RECOMMENDATION 178

Rule-making provisions of all statutes other than the Court Rules Act should be repealed and replaced by reference to the Court Rules Act. This statute should then be the one authority for the making of rules governing practice and procedure before all the courts of the province.

CROWN PROCEEDING ACT

Traditionally there has been a prohibition against anyone taking any action against the Crown - that is the provincial or federal governments - in Small Claims Court. This was reasonable in the days when these courts were presided over by Magistrates who had no legal training and the dollar limits were very low.

Today, Provincial Court Judges hear Small Claims cases and the dollar limits have increased substantially. Further, a person is not allowed to bring a claim in County Court for an amount that is within the jurisdiction of the Small Claims Court. This means that a person with a claim for, say, \$3,000 against the Provincial Government would have to either bring that claim in Supreme Court or abandon it.

RECOMMENDATION 179

The Crown Proceeding Act should be amended to remove the prohibition against actions against the Crown in Small Claims Court.

SUPREME COURT ACT

When a court awards damages in an action, normally the damages are payable in a lump sum. In some cases, however, that is not considered appropriate. For example, if a person has suffered catastrophic injuries in a car accident, possibly including brain damage,



he or she will have special needs for a very long time. In those cases it may be more appropriate for the money to be used to buy an annuity. This will provide income and guarantee security for the injured person.

This type of arrangement is known as a 'structured settlement' and it is being used more and more often, usually by agreement. Some judges feel that they do not now have the authority to order payment of an award by way of structured settlement.

RECOMMENDATION 180

The Supreme Court Act, s. 42, should be amended to clearly give a judge the authority to order an award of damages to be satisfied by way of a structured settlement.

UNIFORM LEGISLATION

The committee received a submission asking for a Uniform Commercial Code, similar to the Code that is in use in the United States. The committee supports as a general principle, the uniformity of legislation across Canada wherever that is appropriate.

Another area, besides commercial activity, where uniformity would be very helpful, is in the field of matrimonial property law. One of the main reasons why people move from province to province is divorce or separation. This means that many family law matters become very much more complicated than they need be, as properties in two or more provinces need to be sorted out. Enforcement of judgments is another field which could benefit from uniformity of legislation.

RECOMMENDATION 181

The committee recommends that the Provincial Government be involved in any initiatives toward uniformity of legislation across Canada. Particular priority ought to be given to legislation respecting commercial matters and family assets.



REFERENCES TO THE LAW REFORM COMMISSION.

A number of submissions that were made to the Justice Reform Committee are clearly worth further study.

The *Limitation Act* should be studied in detail and brought into conformity with the form of legislation which is now being considered in other provinces. Any reform process should review the special limitation periods applied to particular classes of people, such as medical doctors. Any special limitation periods should be fully justified and all similar classes should be treated in the same manner.

The *Negligence Act* should be studied in the light of the decision of the British Columbia Court of Appeal in *Leischner v. West Kootenay*¹. That case established that if a plaintiff has been contributorily negligent then the liability of the defendants is several only, and not joint and several.

Several people recommended that the *Patients Property Act* be amended to recognize the various areas in which a person may be competent or incompetent, such as residential, vocational, social, medical, legal or financial. The Act, it is said, should be amended to allow for a degree of flexibility where the patient is somewhat capable of managing his affairs but does need assistance in some areas. This is a matter that should be looked at.

The suggestion was made to the committee that the 60-day notice provision in the *Municipal Act* should be repealed. This is the section that requires a person to give notice to a municipality within 60 days of an injury or lose the right to bring a lawsuit against the municipality.

The *Workers Compensation Act* was also the subject of comment. The committee heard recommendations that the Boards of Review system be abandoned in favour of a review by a Superior Court Judge. Also, it was said that the court should be given authority to review decisions under the Act to deal with obvious injustices.

The *Insurance Act*, it was recommended, should be amended to allow the Appraisal Act to apply to claims for losses due to interruption of business.

1 [1986] 3 WWR 97.



RECOMMENDATION 182

The following statutes should be referred to the Law Reform Commission of British Columbia for further study: *The Limitation Act; Negligence Act; Patients Property Act; Municipal Act (60 day notice provision); Workers Compensation Act; and the Insurance Act (regarding claims for losses due to interruption of business).*



CONCLUSION

A dominant theme of the Justice Reform Committee's work has been 'access to justice'. The recommendations in this report are made with the intention that they will result in a court system that is more accessible to all.

The obstacles to be overcome are many and varied: they may be economic, or geographic, or they may be barriers to understanding. Some can be removed by a simple rule change; some need money to be spent; and others will require fundamental change in our justice institutions.

The Committee hopes that as a result of the changes recommended in this report, the people of British Columbia will find:

- they have better access, wherever they live in the Province, to the appropriate court;
- they are better able to understand the language of the court and the justice system and can readily find the information that they need;
- in cases involving smaller amounts of money, whether in Small Claims Court or County Court, they are better able to represent their own interests if they so choose;
- procedures for cases involving smaller amounts of money will be simplified so that it will become economical for those who do not wish to represent themselves, to hire a lawyer;
- in complex cases, lawyers and the courts will have the procedural tools that they need to eliminate unnecessary steps and to see that cases are processed as expeditiously as possible;
- in criminal cases, the traditional adversary system is strengthened by new pre-trial disclosure procedures;
- that both civil and criminal trials will be shorter and therefore less expensive; and



- fewer trials will be necessary: more cases will settle before trial or find their way to alternative methods of dispute resolution.

The concern that the Committee has had throughout is that there may be no way of knowing whether these goals have been met, or perhaps more importantly, if reform should take a different direction altogether.

For as long as there have been courts there have been attempts to reform the justice system. The normal approach is to appoint a review body which addresses a list of complaints and proposes solutions. Some are accepted and implemented and others are not. The system goes on for another 10 or 20 years and then the process repeats itself. These efforts at justice reform have often had quite good results, but they do not traditionally effect fundamental change. On writer has said:¹

(A) longer time frame is not a luxury but a necessity to discover some of the best alternatives for improving the administration of justice and therefore, access to justice. The main reason is that a long lead-time is needed to effect fundamental changes in a highly stable system of institutions and processes where the key personnel, judges, usually remain in office for the rest of their working lives once they are appointed.

The Committee recommends that justice reform become a process, rather than a project: an exercise that would involve leaders of the Bench, the legal profession, government and the users of the system in an ongoing examination of the proper role of the justice system in our society. An essential foundation for this process of planning for the future is information based on experience.

Implementation of procedural changes must be accompanied by a careful monitoring of results. For example, if the role of the judge at a pre-trial conference is expanded, the questions must be asked: does this mean more use will be made of these conferences? will they result in more settlements? or will they simply take up more judicial time? If implementation is not followed by a process that can answer these questions, there is no hope for continuing productive reform.

¹ N. Lyon, *Modelling as an Approach to Judicial Reform*, Windsor Yearbook of Access to Justice (1981), 281 at 282.



The Committee urges the Attorney General to take this approach to justice reform. He should assemble a group of people which could draw on a wide variety of experience and interest, from a cross-section of the Province. The community at large should be encouraged to contribute their ideas. In this way, the court system of British Columbia could be an institution that truly serves all of the people of this Province.



SUMMARY OF RECOMMENDATIONS

Plain Language

RECOMMENDATION 1

The Attorney General should establish a Plain Language Committee to develop a strategy for implementation of plain language in the justice system.

This would be a senior level, policy-making body that could provide leadership to the Bar, the Judiciary and to the Government at large. It should be assisted by a working subcommittee.

Access to Legal Information

RECOMMENDATION 2

A toll-free network to allow province-wide access to legal information and referrals should be established. The Canadian Bar Association, British Columbia Branch, or the Legal Services Society are suggested as possible operators of the system.

Education

RECOMMENDATION 3

The committee commends the Ministry of Education for its work in developing legal education in all grades. Further initiatives should be taken as needed to ensure that teachers have the information, textbooks and other resources they require to enable them to educate children about our legal institutions and justice system.

RECOMMENDATION 4

The Ministry of the Attorney General should make the provision of information to teachers, students and the public generally, a priority.

**RECOMMENDATION 5**

Government and other agencies should continue and enhance their financial and other support of the volunteer sector. More citizens could be involved in local activities which will increase their understanding of the justice system.

Alcohol and Drug Abuse**RECOMMENDATION 6**

A system for collecting information on the role that drugs and alcohol play in criminal, civil and family cases should be designed and implemented.

The data collection system should be professionally designed and should be integrated with other information gathering systems proposed elsewhere in this report.

RECOMMENDATION 7

Programs similar to the Alberta Impaired Drivers Course and IMPACT should be designed and implemented in British Columbia for those convicted of driving while impaired by drugs or alcohol. They should be reviewed regularly and revised as necessary.

RECOMMENDATION 8

With the impaired drivers' programs as a pilot project, similar strategies for other court-referred users should be developed.

The Supreme and County Courts**RECOMMENDATION 9**

The committee recommends appointment of eight Supreme Court Judges who will be resident in locations throughout B.C., as follows:

Kamloops:	One
Kelowna:	One
Kootenays:	One
Prince George:	Two
Prince Rupert:	One
Vancouver Island:	Two

RECOMMENDATION 10

The monetary jurisdiction of the County Court should be extended from \$50,000 to \$100,000.



In actions where the title to land is in question, it should be increased from \$100,000 to \$200,000, a more realistic figure, given the current value of real estate in this Province.

RECOMMENDATION 11

All motor vehicle accident cases should be initiated in the County Court; a Supreme Court Judge should have authority to transfer a case to the Supreme Court if the amount involved is clearly more than \$100,000 or if the issues are ones that ought to be tried in the Supreme Court.

RECOMMENDATION 12

The *County Court Act* should be amended to remove any impediments to the exercise of their jurisdiction by the Judges of the Court, throughout the Province.

RECOMMENDATION 13

Section 11 of the *Supreme Court Act* should be amended to broaden the jurisdiction of County Court Judges sitting as Local Judges of the Supreme Court.

RECOMMENDATION 14

All of the procedural changes recommended in this report should be put in place by January 1, 1990.

Three years after implementation of these changes, that is by January 1, 1993, the Attorney General should name a committee drawn from the same segments of society as this committee. The committee should be asked to assess the impact of these changes on the judicial system. If it is determined that the overall efficiency of the courts would be improved by merger, then merger should be implemented.

RECOMMENDATION 15

The Attorney General should consult with the Chief Justice of the Supreme Court to determine whether an Associate Chief Justice position would be beneficial, and if so, should create such a position.

RECOMMENDATION 16

The name of the Supreme Court of British Columbia should be changed to a name that is not confusing to the public.



Family Law

RECOMMENDATION 17

The Supreme Court of British Columbia should have exclusive jurisdiction over all family law matters under the *Family Relations Act* and under the *Divorce Act*.

Provincial Court Judges should be appointed Masters of the Supreme Court of British Columbia and in that capacity should continue to hear the types of cases that they now hear.

RECOMMENDATION 18

The Chief Justice of the Supreme Court of British Columbia should be asked to consider use of an informal family law division similar to that operating in the Vancouver Registry in other major centres where appropriate and where the volume of work may warrant it.

RECOMMENDATION 19

There should be no permanent specialization of Supreme Court Judges in the area of family law.

RECOMMENDATION 20

Masters should hear procedural pre-trial applications in Supreme Court family law matters and Masters should conduct case management conferences and settlement conferences where appropriate.

RECOMMENDATION 21

The Supreme Court Rules should incorporate a set of procedural rules for application in Designated Registries of the Supreme Court of British Columbia. They should be standard across the Province, and in plain language.

RECOMMENDATION 22

Trial dates should be assigned in Designated Registries of the Supreme Court by the Registry without the need for appearance by the parties.

RECOMMENDATION 23

Rules should provide that if a person who is properly served with notice fails to attend at court, an order could be made in that person's absence which would have the same effect as any default order.

RECOMMENDATION 24

There should be programs in place to provide legal counsel to participants in family law proceedings who qualify financially.



RECOMMENDATION 25

The *Family and Child Service Act* should be amended to require notice to parents under s.11, that is, of the 'report to court'.

RECOMMENDATION 26

The *Family and Child Service Act* should be amended to require the Superintendent to make full disclosure of the file to the parents. The only exception should be to give the Superintendent the right to preserve the identity of informants.

RECOMMENDATION 27

The *Family and Child Service Act* should be amended to allow for variation of Orders under s.11 and s.13.

RECOMMENDATION 28

A Judge must be made available for the report to Court, as required by s. 11 of the *Family and Child Service Act*, even if it is administratively difficult to do so. These orders should not be signed by Justices of the Peace unless made with the consent of the parents.

RECOMMENDATION 29

The Supreme Court of British Columbia should have exclusive jurisdiction under the *Family and Child Service Act*.

RECOMMENDATION 30

Every Provincial Court Registry (Family Division) should be, for the purposes of the *Family and Child Service Act*, a Designated Registry of the Supreme Court of British Columbia.

RECOMMENDATION 31

Provincial Court Judges should be appointed Masters of the Supreme Court of British Columbia for the purpose of hearings under the *Family and Child Service Act*.

RECOMMENDATION 32

Appeals from a Master on an interim order should be by rehearing (*de novo*) by a Judge of the Supreme Court of British Columbia.

RECOMMENDATION 33

Appeals from a final order of a Master should be heard by the British Columbia Court of Appeal.

**RECOMMENDATION 34**

Government funding, both Federal and Provincial, should be made available for the appointment of ad hoc Family Advocates in cases where a Judge decides it is appropriate. The cost of the Family Advocate should be paid by either or both parties to the extent that they can afford to pay.

RECOMMENDATION 35

Section 60 of the *Family Relations Act* and Rule 60B(28) of the Divorce Rules, should be amended to stipulate that a demand for financial information must be complied with within 21 days of delivery.

A party should be required to produce copies of:

- a) current financial statements,
- b) a statement of assets and liabilities, and
- c) complete recent corporate tax returns,

for any closely-held corporation in which he or she has a controlling legal or beneficial interest. This includes a corporation in which the party owns more than 50% of the issued shares.

The same obligation to produce would be imposed on the corporation itself.

RECOMMENDATION 36

The form of Statement of Property should be expanded to provide for the identification and value of assets as at date of acquisition, separation date, and the date of swearing of the Affidavit.

There should be a clear requirement that all legal and beneficial interests must be disclosed.

RECOMMENDATION 37

Section 15 of the *Family Relations Act* should be amended to require the investigative report to be served on the parties to the proceeding 30 days before the filing of the Certificate of Readiness.

RECOMMENDATION 38

The Attorney General of British Columbia, after consultation with the Family Law Section of the British Columbia Branch of the Canadian Bar Association and the Law Reform Commission of British Columbia, should revise the *Family Relations Act* provisions which deal with family property.

The revision should make a clear statement of the principles on which family property is to be shared by spouses or former spouses.



RECOMMENDATION 39

Provincial legislation should provide for automatic severance of pension benefits at source when a deferred sharing order or agreement is in existence.

RECOMMENDATION 40

Section 53 of the *Family Relations Act* should be amended to provide that a restraining order or freezing order will be made, but that it be variable from time to time by order of the Court or the consent of the non-owning spouse, such consent not to be unreasonably withheld.

RECOMMENDATION 41

Part III of the *Family Relations Act* should be amended to compel a spouse to produce for inspection all documents and information which an auditor would require when preparing an audit either of the individual or of a closely held corporation in which he or she has a controlling legal or beneficial interest. This includes a corporation in which the spouse owns more than 50% of the issued shares. The same obligation to produce would be imposed on the corporation itself. The statutory requirement would be subject to any court order to the contrary.

RECOMMENDATION 42

A study should be undertaken to devise a means of compiling statistical information on the actual cost of supporting a child (including day care costs and the tax effect of support awards) and providing that information on a current basis, in a format that judges and lawyers can easily use.

RECOMMENDATION 43

Costs of all Supreme Court enforcement proceedings should be awarded on a scale to compensate a party as closely as possible for his or her actual costs.

RECOMMENDATION 44

There must be a program of education aimed at the Bench, the Bar and the public, which will impress upon people the importance of complying with maintenance orders. This must be reinforced by a commitment from the Bench to take an active role in enforcing its own orders.

RECOMMENDATION 45

Arrears of maintenance should be reduced or cancelled only in the most extraordinary circumstances. Orders should not be varied retroactively.

**RECOMMENDATION 46**

The provisions of the Family Relations Act requiring an employer to remit maintenance payments directly, on behalf of an employee, should be available to the Supreme Court as well as the Family Court. In both courts these orders should be granted routinely in cases where default has been established.

RECOMMENDATION 47

In all proceedings under the *Family Relations Act* and the *Divorce Act*, there should be provision for the spouse who is dependent on the other for support, to apply to receive from that spouse at an early stage the estimated costs of the litigation.

RECOMMENDATION 48

Mediation should be encouraged as a constructive method of resolving disputes.

RECOMMENDATION 49

Participation by spouses in mediation should be on a voluntary basis.

RECOMMENDATION 50

Steps should be taken immediately towards a formal program of certification of family mediators.

RECOMMENDATION 51

The location and physical surroundings of any Family Court should reflect the importance of that Court's role in the community.

Family Courts should have waiting areas that do not force family members who are at odds with each other to share the same close quarters. Adequate and private interview rooms are essential.

RECOMMENDATION 52

Where the workload warrants it, the Administrative Judge of the Provincial Court should consider extending sitting hours to include evening and Saturday hours.

Additionally, consideration should be given to extending the hours of availability of Family Court Counsellors.

RECOMMENDATION 53

The *Family Relations Act* should be amended to provide for the filing of Separation Agreements in Supreme Court, by consent, for enforcement or variation.



Criminal Law and Procedure

RECOMMENDATION 54

Regional Crown Counsel should have budgets that will allow appropriate levels of staffing and equipment for Crown Counsel offices throughout the province.

RECOMMENDATION 55

Crown Counsel should be hired initially on contracts of from one to five years with merit the sole criteria for continued employment.

RECOMMENDATION 56

A career path should be established within the Crown Counsel office so anyone who has served in the office for five years and met the appropriate standards would be offered either a five year contract or a permanent Public Service position.

RECOMMENDATION 57

Support for the Criminal Appeals and Special Prosecutions Offices and the Commercial Crime Division should be continued and enhanced where required.

RECOMMENDATION 58

A system of ad hoc Crown Counsel should be maintained, with prosecution work at all levels contracted out to the private bar. However, there should be continuity in the handling of individual cases. Ad hoc counsel should not be put in a position where they do not have adequate time to prepare for court.

RECOMMENDATION 59

The Crown Counsel Interchange Program should be encouraged and enhanced.

RECOMMENDATION 60

The authority to decide what charges will be laid must remain with the Attorney General or his agent - Crown Counsel.

RECOMMENDATION 61

A Chief Constable or officer in charge of a police detachment who is dissatisfied with a Crown Counsel decision not to lay a charge, should have the right to have that decision reviewed by Regional Crown Counsel and ultimately the Deputy Attorney General.

RECOMMENDATION 62

The Preliminary Inquiry should be retained and efforts made to enhance its efficiency and usefulness.

**RECOMMENDATION 63**

The pre-trial disclosure model described should be instituted on an experimental basis at the Provincial Courthouse at 222 Main Street, Vancouver.

RECOMMENDATION 64

Government should make available the funding and staff necessary to make the model work.

RECOMMENDATION 65

A committee of Provincial Court Judges, Crown Counsel and members of the defence bar should be established to coordinate, implement and oversee the experiment for a two-year period.

RECOMMENDATION 66

This committee should hold a series of meetings to explain the proposal to the criminal bar and to encourage full participation and cooperation.

RECOMMENDATION 67

If successful, the model should be implemented in stages, province-wide.

RECOMMENDATION 68

The Legal Services Society must recognize the value of these pre-trial procedures by creating an appropriate Legal Aid tariff item.

RECOMMENDATION 69

The Ministry of the Attorney General should continue its policy of providing to the defence its theory or alternate theories with respect to the commission of the crime, as well as complete disclosure of the evidence which the Crown intends to call at trial.

RECOMMENDATION 70

A committee of judges of the Supreme and County Courts, Crown Counsel, and members of the defence bar should be established to create a set of rules for pre-trial motions in the superior courts.

RECOMMENDATION 71

A committee of judges of the Provincial Court, Crown Counsel, and members of the defence bar should be established to create a set of rules for pre-trial motions in the Provincial Courts.

RECOMMENDATION 72

Counsel should be encouraged to make pre-trial motions before the date set for trial, and as early as possible.



RECOMMENDATION 73

The Legal Aid tariff should be amended to compensate counsel for bringing motions prior to the trial date.

RECOMMENDATION 74

Section 482 of the *Criminal Code* should be expanded to include Provincial Court Judges for the purposes of judge alone trials.

RECOMMENDATION 75

Section 464 of the *Criminal Code* should be amended to allow an accused to choose trial by a Provincial Court Judge without a jury after having a Preliminary Inquiry.

RECOMMENDATION 76

The accused should still have the option of choosing a judge alone trial in a higher court.

RECOMMENDATION 77

Crown Counsel should be allowed the time to meet the reasonable needs and concerns of witnesses.

RECOMMENDATION 78

Enhanced witness management and notification programs should be put in place and maintained.

RECOMMENDATION 79

The Ministry of the Attorney General should produce a videotape which can be used by Crown Counsel to familiarize witnesses with the criminal justice system and the trial process.

RECOMMENDATION 80

The provision of victim and witness services at police detachments, community agencies, probation and Crown Counsel offices should be continued.

RECOMMENDATION 81

The *Criminal Injuries Compensation Act* should be reviewed and consideration given to increasing the compensation available and broadening the coverage of the Act.

RECOMMENDATION 82

A strong message must be sent to the public that wife assault is as serious an offence against society as is assault of a stranger.

**RECOMMENDATION 83**

The diversion program now in place in British Columbia should be maintained and encouraged.

RECOMMENDATION 84

The Ministry of the Attorney General should ensure that the diversion policy is uniformly applied by Crown Counsel throughout the province.

RECOMMENDATION 85

The Ministry of the Attorney General and the Ministry of the Solicitor General should ensure that facilities for diversion are available province-wide.

RECOMMENDATION 86

The Ministry of the Attorney General should institute procedures, either by amendment to the *Jury Act* or by directive to the Sheriffs, that will ensure that jury panels reflect the ethnic diversity of the various communities in this province, and that the same people are not called upon repeatedly.

RECOMMENDATION 87

The radius of return on warrants for arrest should remain in the discretion of the Crown.

However, reciprocity among provinces is to be encouraged. This subject should be addressed by the provincial Attorneys General at their next meeting.

RECOMMENDATION 88

The Ministry of the Attorney General should give high priority to the enforcement of fines. In particular, civil enforcement procedures available under the *Offence Act* and the *Small Claim Act* should be applied more rigorously.

Consideration should be given to the acceptance of credit cards in payment of fines and to providing incentives in the form of reduction in penalty for prompt payment.

Pre-Trial Case Management

RECOMMENDATION 89

The powers available to a Judge on a Summary Trial (Rule 18A), when the court is unable to grant judgment should be broadened to include all those powers included in the proposed rule 41A.



RECOMMENDATION 90

The powers available to a Judge on a Pre-Trial Conference (Rule 35) should be broadened to include all those powers included in the proposed Rule 41A.

RECOMMENDATION 91

A new rule, Rule 41A, should be adopted which would give a judge, whether on a Rule 18A application or on a Pre-Trial Conference, certain powers which are aimed at the more efficient pre-trial management of cases.

RECOMMENDATION 92

The committee recommends adoption of a 'Flag Rule' which would require parties to file a Certificate of Readiness at a fixed time before trial. For long cases that time would be 90 days before trial; for medium cases, 60 days; and for shorter cases, 30 days.

RECOMMENDATION 93

In cases which are estimated to require more than 15 days of trial time, the parties should be required to file an agreed Case Management Program within 30 days of the close of pleadings. A trial date would not be allocated in any case estimated to last for more than 15 days until a Case Management Program has been filed.

RECOMMENDATION 94

There should be an amendment to the Rules to provide that a judge who has been extensively involved in the pre-trial management of litigation will not take the trial, unless all counsel file in the Registry a common request to that effect.

Selected Topics in Case Management

RECOMMENDATION 95

The granting of adjournments is always at the discretion of the judge. However, because they contribute to cost and delay in litigation, they should be granted only when justice requires.

RECOMMENDATION 96

Notices to Admit Facts should be mandatory in every case.

**RECOMMENDATION 97**

There should be a new Rule requiring counsel in all cases (except Economical Litigation Program cases) to file a Statement of Agreed facts no later than 30 days before trial. If agreement cannot be reached, each counsel should file a Statement of Agreed Facts as he perceives them to be.

RECOMMENDATION 98

Continuing Legal Education and Professional Legal Training Course should emphasize in their programs the importance to good advocacy of obtaining admissions and agreeing to that which is not in issue.

RECOMMENDATION 99

A Practice Directive should be issued listing the applications that can be made by Desk Order. Consideration should be given to extending the list to include as many other matters as may be appropriate.

RECOMMENDATION 100

A Demand for Discovery of Documents should no longer be required. Every party to an action should be required to file and deliver to each opposing party an Affidavit of Documents within a fixed time.

RECOMMENDATION 101

Discovery Conferences should be used to control abuses and promote the conduct of discovery in the most economical and convenient form possible.

RECOMMENDATION 102

Courses should be developed by Continuing Legal Education and Professional Legal Training Course to demonstrate not only proper use of discovery techniques, but also their improper use; and to foster in the profession the skills and motivation necessary to use discovery procedures and techniques efficiently and economically.

RECOMMENDATION 103

The Rules and *Evidence Act* should be amended to allow a judge, upon application at any stage of a proceeding, to fix the times for exchange of expert opinions.

In every case where there is no order, the time for delivery of expert reports should be 30 days before the date fixed for filing the Certificate of Readiness.

RECOMMENDATION 104

Rule 29 should be amended to allow for interrogatories to be served on an expert whose report has been served by a party adverse in interest.



RECOMMENDATION 105

Continuing Legal Education and the Professional Legal Training Course should include course material both encouraging the appropriate uses of well-designed Interrogatories and discouraging the indiscriminate application of word processed 'standard' questions.

RECOMMENDATION 106

In order to further enhance the effectiveness of Interrogatories, a rule should be adopted which imposes a continuing obligation to answer Interrogatories.

RECOMMENDATION 107

More and better use should be made of Settlement Conferences and Mini-Trials, in appropriate cases.

RECOMMENDATION 108

Procedures should be established that will allow both the Settlement Conference and the Mini-Trial to achieve their full potential as settlement devices.

RECOMMENDATION 109

Greater use should be made of Special Referees, where appropriate.

RECOMMENDATION 110

Continuing Legal Education and the Professional Legal Training Course can play an important part by ensuring that all relevant courses fully explain the role and potential benefits of a reference to a Special Referee.

Economical Litigation Program

RECOMMENDATION 111

A new procedure should be established in County Court, for cases involving \$20,000 or less, to be known as the Economical Litigation Program. With simplified procedures it would accommodate unrepresented litigants and would also make it possible for lawyers to take these cases at a fee that is in proportion to the amount at stake.

The essential features of this program would be: easy-to-use forms; a pre-trial conference before a Master or Registrar; no examinations for discovery; a shorter, less formal trial and an early trial date.



Masters and Registrars

RECOMMENDATION 112

Much greater use should be made of the position of Master in the Province. Obvious locations for their use would be Kamloops, Kelowna, New Westminster, Prince George, Vancouver and Victoria.

RECOMMENDATION 113

Masters should be appointed by the Lieutenant Governor in Council on the recommendation of the Attorney General, with the consent of the Chief Justice of the Supreme Court.

Masters of the Supreme Court should have qualifications equal to those of a Provincial Court Judge and should be employed on the same terms and at the same rate of pay.

Appeals

RECOMMENDATION 114

A new *Appeals Procedure Act* should define two distinct appeal processes: a new trial or a review on a question of law.

Each statute that provides for an appeal to a court should either clearly define the appeal procedure or refer to the *Appeals Procedure Act* and designate which of the two procedures applies.

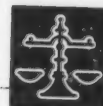
Lawyers' Fees

RECOMMENDATION 115

In the interests of fulfilling its duty to protect the public interest in the administration of justice, the Law Society must be vigilant to exercise its disciplinary powers in instances where unreasonable fees have been charged.

RECOMMENDATION 116

The *Legal Profession Act* should be amended to make it clear that the principles in *Yule v. City of Saskatoon* do apply to a review by the Registrar of a contract for fees.



RECOMMENDATION 117

The Benchers of the Law Society should reconsider the recommendation of the 1982 report of their committee on contingency fees and use their power under s. 78 of the *Legal Profession Act* to make a rule establishing a sliding scale of maximum contingency fees.

RECOMMENDATION 118

To benefit clients generally, Continuing Legal Education and Professional Legal Training Course should offer programs that will teach lawyers how to budget a lawsuit.

RECOMMENDATION 119

The Law Society should consider ways of communicating information to the public about the ways that lawyers charge for legal services.

Costs

RECOMMENDATION 120

The Basic Tariff under Appendix B and the Tariff of Costs Between Solicitor and Client under Appendix C should be replaced with a single tariff.

RECOMMENDATION 121

The Basic Tariff in Schedule B should be tripled. It will then reflect approximately 50% of actual costs to the client.

RECOMMENDATION 122

The minimum and maximum amounts in the Basic Tariff should be replaced with a set amount for each item.

RECOMMENDATION 123

The Schedule of Maximums should be eliminated.

RECOMMENDATION 124

On all pre-trial applications, there should be an order as to costs at the end of the hearing.

RECOMMENDATION 125

The word 'taxation' and its various forms should be replaced wherever they appear in the Supreme Court Rules and in the statutes, with plain language that will make sense to lawyers and non-lawyers alike.

**RECOMMENDATION 126**

When a party has put another party to further expense to enforce or collect a judgment, the Registrar should award full reimbursement of all those extra costs which were incurred reasonably and properly.

Court Filing Fees**RECOMMENDATION 127**

There should be a simple, straightforward procedure for people who wish to apply for a waiver of court filing fees on the basis that they are indigent.

Small Claims Court**RECOMMENDATION 128**

The monetary jurisdiction of the Small Claims Court should be raised to \$5,000 and should be reviewed regularly.

RECOMMENDATION 129

Provincial Courts, travelling on circuit, should be designated as branch registries for the purpose of receiving and processing Small Claims documents. Government agents in remote areas should be authorized to receive Small Claims documents for the purpose of transmission to the nearest registry.

RECOMMENDATION 130

The Chief Judge of the Provincial Court should consider evening and weekend sitting hours for the court and expanded registry hours, where the volume of business warrants it.

RECOMMENDATION 131

There should be a new *Small Claims Act* which would guide the Judges in the application of summary justice, as well as a set of rules appropriate to the Court.

RECOMMENDATION 132

There should be a Master Registrar for Small Claims Courts throughout the Province with responsibility for staff training, ensuring standard practice, and public information.



RECOMMENDATION 133

Security deposit disputes should be handled by the Residential Tenancy Branch of the Ministry of Labour and Consumer Services and not by Small Claims Court.

RECOMMENDATION 134

Efforts should be made to simplify enforcement proceedings in Small Claims Court. A successful plaintiff should have the option of having a Judgment Summons hearing conducted immediately following judgment. Forms of release should be provided to accommodate a defendant who is willing to pay the judgment on the spot.

RECOMMENDATION 135

Garnishing Orders Before Judgment should be abolished in Small Claims Court.

RECOMMENDATION 136

Appeals from decisions of the Small Claims Court should be abolished.

Enforcement of Municipal Bylaws

RECOMMENDATION 137

Sitting Justices of the Peace should be appointed for Kelowna and for Prince George who would travel to the municipalities in their regions and hear municipal bylaw cases. If successful, the service should be expanded throughout the Province.

RECOMMENDATION 138

The *Municipal Act* and the *Vancouver Charter* should be amended to allow municipalities to designate those bylaws that could be enforced by means of a ticket and to set the maximum allowable fine. The municipalities would be responsible for collecting fines and, where there is no payment, issuing summonses and forwarding the file to Provincial Court.

Alternate Dispute Resolution

RECOMMENDATION 139

The new Nathan T. Nemetz Centre for Dispute Resolution at the University of British Columbia should conduct the kinds of studies of Canadian ADR projects that have been done in the United States to allow policy-makers to make decisions based on Canadian experience and Canadian values.

**RECOMMENDATION 140**

Judges should be encouraged to raise at pre-trial conferences the possibility of referring the issue of the amount of damages, if not liability, to mediation.

RECOMMENDATION 141

The Law Foundation should give careful consideration to funding any proposals for the communication of information about mediation of personal injury claims to the public. If more people are aware of that as an option, more people will insist that their lawyers at least explore the possibility of mediation with them before proceeding with litigation.

RECOMMENDATION 142

The Professional Legal Training Course and Continuing Legal Education should include in their programs information about mediation so that lawyers may become more aware of its availability, particularly in personal injury cases, and its features.

RECOMMENDATION 143

It is the responsibility of every lawyer to consider, at every stage of a lawsuit, those alternate dispute resolution techniques that offer the best prospect of settling the claim and to take advantage of them wherever appropriate. Law schools, Professional Legal Training Course and Continuing Legal Education should emphasize the importance of that responsibility in their courses.

RECOMMENDATION 144

Lawyers who draft contractual agreements should address their minds at that time to the most appropriate means of resolving disputes that may arise, keeping in mind the variety of alternate dispute resolution techniques available.

RECOMMENDATION 145

Every encouragement should be given to community-based projects which provide alternatives to the court system for claims involving small sums of money and appropriate issues.

RECOMMENDATION 146

The centre for alternate dispute resolution at the University of British Columbia should be encouraged to develop a set of standards for training of ADR professionals and to work towards a set of professional standards and a system of certification.



Justice Requirements of Particular Groups

RECOMMENDATION 147

Disadvantaged groups in society should have access to funding which will allow them to define and enforce their rights under the Charter of Rights and Freedoms in respect of provincial legislation, in the same way that is available in respect of federal legislation.

RECOMMENDATION 148

Courthouses and buildings that house courtrooms, registries, Legal Aid offices, police, Crown Counsel, courtworkers and counsellors, and law libraries should be upgraded to allow access by the physically disabled.

RECOMMENDATION 149

Educational programs aimed at producing qualified court interpreters for the hearing impaired should be supported.

RECOMMENDATION 150

Any new computer-assisted court-reporting technology that is adopted for recording purposes should be considered from the point of view of possible benefit for the hard of hearing in the courtroom.

RECOMMENDATION 151

Those who are involuntarily admitted to mental health facilities need to information about their rights with respect to their detention. This information must be communicated to them in a meaningful way.

RECOMMENDATION 152

The Ethics Committee appointed by the Ministry of Health should study the rights of patients under the Mental Health Act, and their families, to participate in decisions about their course of treatment.

RECOMMENDATION 153

Increased efforts should be made by all those engaged in the production of legal information materials to communicate with British Columbians who for any reason cannot take advantage of the materials now available. As new opportunities become available, they should be taken advantage of to tailor methods of communication to the particular needs of disadvantaged groups in society.

**RECOMMENDATION 154**

Government and other appropriate agencies should expand support to the Native Courtworker Program to make it more widely available to Native people in the Province, and in particular to provide for Native Courtworker services in Family Court to deal with child apprehensions.

RECOMMENDATION 155

Native communities should be encouraged to develop their own diversion programs and supported in this endeavour by those with the responsibility of leadership in the justice system.

RECOMMENDATION 156

Mediation and counselling services should be made available to Native people who encounter family problems and those people should be made fully aware of the services that do exist.

RECOMMENDATION 157

The Chief Judge of the Provincial Court should be encouraged to arrange for sittings of the Court on Indian Reserves whenever possible, particularly in remote areas, and wherever it could help foster greater understanding.

RECOMMENDATION 158

The Solicitor General should consider and adopt where appropriate, the recommendations respecting Native Offenders in the 1988 Report of the Standing Committee on Justice (The Daubney Report).

RECOMMENDATION 159

The recommendations of the 1984 British Columbia Task Force on Public Legal Services must be fully implemented.

Technology and the Courts

RECOMMENDATION 160

A carefully designed Management Information System is essential for monitoring the functioning of the court system and for measuring the success or failure of procedural reforms throughout the Province.

RECOMMENDATION 161

A properly designed Management Information System would permit the development of standards and models for the various types of cases handled by the Courts. These would provide a basis for forecasting future demand and management of resources to meet those demands.



RECOMMENDATION 162

The feasibility of a complete electronic filing system to replace the present paper filing system in the Court Registry should be studied. Such a system would store documents which are now filed in the courthouse, in a computerized electronic database so that each file could be searched by remote terminal.

RECOMMENDATION 163

There should be a detailed study of the documents now required to be filed in the course of litigation with a view to eliminating the filing of unnecessary forms, and improving present forms if possible.

RECOMMENDATION 164

Government should consider the types of information now contained in government databases which would be of interest and use to the public and the Bar with a view to allowing public access to that information through a user-pay dial-up system.

RECOMMENDATION 165

A Central Judgment Registry should be created as a means of facilitating the enforcement of judgments of the courts.

RECOMMENDATION 166

A decision database should be created in the court system, making use of the decisions of the courts that are typed by the judges' secretaries and filed in the court. Cases would be accessible to judges, the public and the Bar by remote terminal and would generate revenue for government.

RECOMMENDATION 167

The committee applauds the initiative of the Director of Land Titles in attempting to simplify conveyancing practice and recommends that the project be completed as quickly as possible.

RECOMMENDATION 168

A steering committee should be established with broad terms of reference to co-ordinate the application of computers, management informations systems and other technology to the justice system. The committee should consist of representation from the Bench, the Bar the Ministry of the Attorney General, and the public.

RECOMMENDATION 169

A senior management person should be given responsibility for ensuring the appropriate level of service by Official Court Reporters and the terms of the contracts entered into should allow for proper management.

**RECOMMENDATION 170**

Court reporter contracts for attendance in the Supreme or County Courts on a daily basis should require the reporter to provide the court and counsel with a transcript in computer readable form.

RECOMMENDATION 171

The terms of the contracts that the government enters into with Official Court Reporters should be reviewed and renegotiated as those contracts expire, to address the problems that have been identified.

RECOMMENDATION 172

A computer integrated courtroom should be established in Vancouver as a pilot project. After experience is gained with a variety of cases the project should be assessed and extended if appropriate to other courtrooms in Vancouver and throughout the province.

RECOMMENDATION 173

The Supreme Court Rules should be amended to specifically provide for service of documents by facsimile transmission.

RECOMMENDATION 174

The Rules Committee should develop specific rules to deal with the widespread and expanding use of facsimile transmission equipment.

RECOMMENDATION 175

A facsimile machine should be located in the Court of Appeal Vancouver Registry and interim rules devised to allow for the filing of Notices of Appeal and other appropriate appellate documents from outside Vancouver by means of the machine. This should be viewed as a pilot project to test the use of facsimile transmission for court filings generally.

Statutory Amendments

RECOMMENDATION 176

The County Court Act should be amended to include the same provisions as s. 47 of the *Supreme Court Act*. This will make it clear that County Court Judges have the same authority as a Justice of the Supreme Court to order a reference to a Special Referee under Rule 32.



RECOMMENDATION 177

The Federal Government should be urged to promptly repeal the sections of the *Interest Act (Canada)* so that the *Court Order Interest Act 1982* may be proclaimed.

RECOMMENDATION 178

Rule-making provisions of all statutes other than the Court Rules Act should be repealed and replaced by reference to the Court Rules Act. This statute should then be the one authority for the making of rules governing practice and procedure before all the courts of the province.

RECOMMENDATION 179

The *Crown Proceeding Act* should be amended to remove the prohibition against actions against the Crown in Small Claims Court.

RECOMMENDATION 180

The *Supreme Court Act*, s.42, should be amended to clearly give a judge the authority to order an award of damages to be satisfied by way of a structured settlement.

RECOMMENDATION 181

The committee recommends that the Provincial Government be involved in any initiatives toward uniformity of legislation across Canada. Particular priority ought to be given to legislation respecting commercial matters and family assets.

RECOMMENDATION 182

The following statutes should be referred to the Law Reform Commission of British Columbia for further study: The *Limitation Act*; *Negligence Act*; *Patients Property Act*; *Municipal Act* (60 day notice provision); *Workers Compensation Act*; and the *Insurance Act* (regarding claims for losses due to interruption of business).



SUBMISSIONS

Gerald Adamus, New Westminster
 Jason Austin, Victoria
 B.C. Arbitration and Mediation Institute (H.D.C. Hunter), Vancouver
 B.C. Association for Family Rights, Kamloops
 B.C. Association for Family Rights, Kelowna
 B.C. Association for Family Rights, Vernon
 B.C. Association of Chiefs of Police
 B.C. Civil Liberties Association, Vancouver
 B.C. Federation of Labour, Burnaby
 B.C. International Commercial Arbitration Centre, Vancouver
 B.C. Public Interest Advocacy Centre, Vancouver
 B.C./Yukon Transition House Society, Vancouver
 Manfred Bader, Terrace
 Dorothy Beck, Vancouver
 Robert Bennett, Port Hardy
 Joyce Bradley, Vancouver
 David Brander-Smith, QC, Vancouver
 David Brine, Surrey
 British Columbians for Mentally Handicapped People (Jean Bennett), Vancouver
 Nancy Buckman, Vancouver
 Burns Lake Law Centre Society
 Lee Burrows, Campbell River
 Duncan Campbell, Prince Rupert
 District of Campbell River
 Campbell River Bar Association
 Canadian Bar Association, B.C. Branch, Vancouver
 Canadian Bar Association, Civil Litigation Subsection
 Canadian Bar Association, Civil Litigation Subsection (R. Weddigen and others)
 Canadian Bar Association, Criminal Justice Subsection
 Canadian Bar Association, Family Subsection
 Canadian Dispute Resolution Corporation, Vancouver
 Canadian Mental Health Association, Nelson
 J.S. Carfra, QC, Victoria
 Central Okanagan Elizabeth Fry Society, Kelowna
 Murray Charleson, Campbell River
 Dugald E. Christie, Vancouver
 Citizens United for Justice and Safety, Duncan
 Community Diversion/Mediation Services, Victoria
 Consumers' Association of Canada, B.C. Branch (Ada Brown), Vancouver
 County Court of British Columbia
 Courtenay Bar Association
 Cowichan Bar Association, Duncan
 Criminal Justice Branch, Ministry of the Attorney General



Ed de Walle, Terrace
Disabled Peoples' Advocacy Project (Peter Carver), Vancouver
Jeanne Eddington, Surrey
Emily Murphy Transition House, North Vancouver
Family Court and Youth Justice Committee, Comox Valley
Family Court Committee of Victoria
Family Court/Youth Justice Committee, Vancouver
La Federation des Franco-Colombiens, Vancouver
Fraser Institute (David Gill), Vancouver
Fraser Valley Bar Association, White Rock
Judith Fulford, Powell River
Barry D. Gaetz, Victoria
Diana J. Giesbrecht, Brentwood Bay
Gitksan Wet'Suwet'En Education Society, Hazelton
Town of Golden
Harold Goldfeder, Vancouver
Greater Vancouver Law Students Legal Advice Society
Marlene Hahn, Coquitlam
Linda Halliday, Comox
Paul Stephen Henry, Kelowna
Insurance Corporation of B.C., North Vancouver
International Specialized Risk Management (David Pym), Vancouver
Victor Jolliffe, Terrace
The Jenkins, Victoria
Kamloops and District Elizabeth Fry Society
Kamloops Family Law Sub-Section
City of Kelowna
Kelowna Bar Association
Bill Kennedy, Richmond
Kermode Friendship Society, Terrace
Kitimat Chamber of Commerce
Kootenay Bar Association, Fernie
Kootenay Society for the Handicapped, Castlegar
Agnes Krantz, Prince George
Law Centre Association, Victoria
Law Society of British Columbia, Vancouver
Legal Services Society of B.C., Vancouver
Ann Magnussen, Prince George
Robert G. Matheson, Vernon
Corporation of the District of Matsqui
Matsqui Police Board
Wilfred Mattenly, Vancouver
Gregory J. McDade, Kelowna
Neil McDiarmid, QC, Victoria
A. McEachern, CJBC
B. McLachlin, CJSC
Mediation/Arbitration Centre, Victoria
Mediation Development Association of B.C. (Peggy English), Vancouver
Mental Patients' Advocate Project, Vancouver
David Miller, Nelson
Ministry of Social Services & Housing (Family and Child Services), Prince George
M. Morgan, Terrace
Mothers Against Drinking Drivers (South Okanagan), Oliver
Mount Pleasant Watch (Court Watch Group), Vancouver



City of Nanaimo
 Nanaimo County Bar Association
 Native Courtworker and Counselling Association, Prince George
 Forrest Nelson, Dawson Creek
 Nelson Family Court Committee
 N. Nemetz, CJBC (retired)
 New Westminster Bar Association
 Donald Niedermayer, Cranbrook
 Jan A. Nordin, North Vancouver
 North Shore Information and Volunteer Centre, North Vancouver
 E. O'Donnell, PCJ, Courtenay
 Stephen Owen, Ombudsman for B.C., Vancouver
 Owen, Bird, Vancouver
 Penticton and District Bar Association
 City of Prince George
 Prince George Bar Association
 Prince George Elizabeth Fry Society
 Prince Rupert County Bar Association
 Provincial Court of British Columbia, Civil Committee
 Provincial Court of British Columbia, Criminal Committee
 Provincial Court of British Columbia, Family Committee
 Provincial Judges' Association of B.C.
 Rental Housing Council of B.C., Vancouver
 Society for Children's Rights to Adequate Parental Support (SCRAPS), Vancouver
 Salvation Army, Correctional Services
 Salvation Army, Family Services (W.J. Wiseman), Vancouver
 Keith Seney, Surrey
 Smithers Indian Friendship Centre
 Bruce Stanley, Victoria
 Sam Stevens, Vancouver
 Corporation of the District of Summerland
 Supreme Court of British Columbia
 Norman Tabuteau, Victoria
 Task Force on Downtown Victoria
 John Tejani, Victoria
 Tenants Rights Coalition, Vancouver
 Art Timmers, Chilliwack
 Trial Lawyers Association of B.C. (Kenneth Price), Vancouver
 Tsang and Company, Vancouver
 Leanne L. Turnbull, Vancouver
 Gordon Turriff, Vancouver
 Union of B.C. Municipalities
 Vancouver Assaultive Husbands Project
 Vancouver Bar Association
 Vancouver Community Legal Assistance Society
 City of Vernon (Klaus Tribes)
 Victims of Crime, Kelowna
 Victims of Law Dilemma (D.C. Stretch) Vancouver
 Victoria Bar Association
 Victoria Civil Litigation Sub-Section
 Victoria Criminal Justice Sub-Section
 Victoria Police Department
 Victoria Young Lawyers Sub-Section
 Humphrey Waldock, Vancouver



Keith Walker, Port Coquitlam
F. Kenneth Walton, Victoria
Cheryl Wehren, Abbotsford
West Kootenay Women's Association, Nelson
Western Society for Senior Citizen Services (Morvan Ewan), New Westminster
Bryan Williams, QC, Vancouver
Fraser Wilson, Prince Rupert
Women in Need Society, Trail
Women's Resources Society, Port Alberni
Douglas E. Woodall, Victoria
David Wynja Willingdon, Burnaby
Zlotnick, Lamb and Scarratt, Vancouver
Mr. Zuda, Terrace



LETTERS

R. Blake Allan, PCJ, Victoria
James T. Allard, Port Coquitlam
Peter Altridge, Vancouver
Alzheimer Society of B.C. (Andree Hayden), Vancouver
D.C. Andrews, Vancouver
K. Arkell, CCJ, Vernon
Les Armistead, Clearbrook
Association of Learning Disabled Adults (Grace Pointkovsky), Vancouver
B.C. Association of Social Workers (Stuart Alcock), Vancouver
B.C. Friends of Schizophrenics, Vancouver
B.C. Law Reform Commission, Vancouver
D. Bacon, Courtenay
Diane Bailey, Vancouver
Terri Ball, Prince George
Francis Barnett, Kamloops
B.W. Baumgartel, New Westminster
LaMar Baxter, Telkwa
Alec C. Beasley, Winfield
Susan D. Begley, New Westminster
Karen Bennett-O'Brien, Vancouver
Better Business Bureau of Vancouver Island (Sylvia G. Horvath), Victoria
Jobst R. Henry Bode, Vancouver
S.H. Boorinan, White Rock
David Borthwick, Victoria
J.C. Bouck, J, Vancouver
Harry Brett, Victoria
Lloyd Brinson, Nass Camp
Glen Buckley, North Delta
William Amos N. Butler, Victoria
Joy Calderwood, Vancouver
C.M. Caldwell, Victoria
Anthea Cammell, Summerland
D. Campbell, CJCC
John J. Campbell, Murrayville
Campbell River Association for the Mentally Handicapped
Canadian Mental Health Association (Helen Holyk), Kelowna Branch
Canadian Mental Health Association, Prince George Branch
Canadian Mental Health Association, Vancouver
Canadian Nationalist Alliance, Port Alberni
Karen Canuel, Surrey
Dale Carr-Harris, Vancouver
Regional District of Central Okanagan
Douglas R. Chalke, North Vancouver
William Charney, Enderby
Raymond Chouinard, Vancouver
Christian Volunteers in Corrections (M2/W2 Association), Clearbrook
G.H. Christensen, Port Alberni
Jan Christiansen, Prince George



Citizens Commission on Human Rights (Bruce M. Clark), Vancouver
Citizens United for Safety and Justice (Herbert Cowan), North Vancouver
Clarkson Gordon (David Hooper), Vancouver
R. Collver, PCJ, Vancouver
City of Colwood
Comox Valley Bar Association
Confederation of Canadian Unions, B.C. Council (Cathy Walker), New Westminster
Consulting Engineers of B.C., Vancouver
Consumer and Corporate Affairs Canada, Pacific Region (Lois Smith MacGregor),
Vancouver
Courtenay Family Court and Youth Committee (D. Hillian)
Joe Crawshaw, Q Cove, Quadra Island
Lucy N. Croockewit, West Vancouver
John L. Crowley, Vancouver
G. Cumming, J, Vancouver
C. Jeremy Dalton, Vancouver
Audrey Dew, Vernon
Bernard Diedrich, Burnaby
Downtown Realty (David Jones), Vernon
Betty Eckgren, Victoria
Constance Edwards, Vancouver
M.G. Elston, Cobble Hill
Sunny Emms, Mission
John Fawcett, Victoria
Gordon Fawcus, Duncan
Ed Fitzgerald, Chilliwack
James L. Floyd, Penticton
Fort Nelson - Liard Regional District
Mel Foster, Duncan
Stanley Freestone, Nanaimo
Leonard Futter, Penticton
Alex and Linda Galawray, Burnaby
James Garrett-Rempel, Powell River
Judi Gedye, Vancouver
Myrna Gething, Hudson's Hope
E.A. Gill, Victoria
Lindsay L. Gill, Abbotsford
Gaston Godbout, Victoria
Dorothy Smith Gooden, Salmon Arm
Goodyear Canada (Ted Wilson), Vancouver
J.B. Graham, Corrections Branch
Peter L. Grant, Smithers
Rosamonde Green, Vancouver
Glenford Greene, Smithers
Jan Greenwood, Victoria
David L. Gustafson, Langley
Percy Hammerstrom, Brackendale
Susan Hare, Tofino
Lyle G. Harris, Vancouver
A.T. and Dolores Harrison, Kelowna
Robert H. Hawkins, Vancouver
Gerald Hempler, Vancouver
T. Hennigan, Vancouver
David A. Hobbs, Vancouver



John Hogg, Kamloops
 Edward Holekamp, Courtenay
 David Hough, North Vancouver
 Insurance Bureau of Canada (Brian E. Stanhope), Vancouver
 Institute of Chartered Accountants of B.C. (P.D. Homenuk)
 Ivis Wood Industries (Walter Raupach), Yarrow
 Keith Jobson, Victoria
 John Howard Society of B.C. (Willie Blonde), Victoria
 Justice Institute, Corrections Academy (Steve Howell), Vancouver
 Justice Institue (Marjorie Burdine), Vancouver
 Nurdin Kassam, Vancouver
 E.A. Keate, West Vancouver
 Kelowna and District Society for the Mentally Handicapped
 Jack Kennedy, Victoria
 Peter D. Kennedy, Hope
 William Kennedy, Vancouver
 Hank D. Keorts, Saanichton
 Bryon E. Kernaghan, Cranbrook
 D. Barry Kirkham, QC, Vancouver
 Kenneth Kjellander, Victoria
 Waldy Klassen, Clearbrook
 Langley City Fire Department
 Langley Legal Services
 Victoria Law, Surrey
 Law Centre (Laura Sorenson), Victoria
 Law Courts Public Education Program, Vancouver
 Ian B. Lawson, Prince Rupert
 Ernie Lecours, Richmond
 Marcelle Leibel, Kamloops
 Kenneth and Kathey Linde, Williams Lake
 Christopher Lindsell, Surrey
 Rolf W. Loth, Penticton
 Tim Louis, Vancouver
 Lower Mainland Equipment Owners Association (D.L. Christie), Fort Langley
 Bruce Lowther, Victoria
 Hazel Lypps, Chase
 Ronald F. MacIsaac, Victoria
 Peter Magusin, Farmington
 W. de M. Marler, Dar Es Salaam, Tanzania
 Anne Martin, Mission
 Mawhinney and Kellough, Vancouver
 John McAlpine, QC, Vancouver
 Gordon McKee, North Vancouver
 Sarah McKenzie, Courtenay
 Stanley P. McKinnon, Surrey
 Tom McLachlan, Trail
 Linda M. McLeod, Dawson Creek
 Marjorie McLeod, North Vancouver
 W. McMurchy, Celista
 Robert McNeney, Vancouver
 McQuarrie Hunter, New Westminster
 Wendy Meilleur, Garibaldi Highlands
 K. Meredith, J, Vancouver
 Mid-Island Sexual Assault Centre (Dana Becker), Nanaimo



Nancy K. Miles, Duncan
Ministry of the Attorney General, Court Services (A.K.B. Sheridan)
Ministry of Labour and Consumer Services (Lee Doney), Victoria
District of Mission
Donald S. Moir, Vancouver
Crispin Morris, Courtenay
Valerie Morrow, Vancouver
David Moss, Duncan
Mothers Against Drinking Drivers, Victoria
Legal Services Society, Native Programs (Barbara Murphy), Vancouver
Nanaimo Citizens Advocacy Association
Albert Nicoll, 100 Mile House
Venus Noel, Genelle
Northgate Counselling Services (John F. Klassen), Dawson Creek
North Island Crisis Center Society (Elva M. Hogan), Port Hardy
North Shore Crisis Services Society, North Vancouver
Corporation of the City of North Vancouver (Bruce Hawkshaw)
North Vancouver Family Court Committee
Fred Nuzsdorfer, North Vancouver
David S. Nuttall, West Vancouver
Regional District of Okanagan-Similkameen
Okanagan-Similkameen Regional Hospital District
R.D. Ouellette, Port Alberni
P.W. Bickford and Company, Vancouver
Rosemary Pawliuk, Burnaby
Brian D. Perry-Whittingham, Sooke
Jake Peters, Parksville
W.J. Polglase, Vancouver
City of Port Alberni
Port Alberni Friendship Center (Alice Hunter)
Port Coquitlam Area Women's Centre
Powell River Legal Services Society
Lorne D. Priestley, West Vancouver
City of Prince Rupert
Prince Rupert Transition House Society
Professional Legal Training Course (David Cruickshank), Vancouver
Robert D. Punnett, Prince Rupert
F.W. Putysche, Fruitvale
Christina Rainey, Victoria
R.C.M.P., E Division (D.K. Wilson), Vancouver
R.C.M.P., E Division (B.A. Beaudreau), Vernon
P.J. Ranger, Powell River
Richmond Community Services Advisory Council
Richmond Family Court Committee
Patrick, Kristine, Neil and Jennifer Riley, Powell River
Robson and Associates Consultants, Maple Ridge
Alan Ross, Vancouver
Peter and Carol Ruoss, Princeton
Nicholas Sawchen, New Westminster
Joan Saxton, Vancouver
E. Shore, Clearbrook
Moe Sihota, Victoria
P.C. Simon, Vancouver
John R. Singleton, Vancouver



Vincent M. Siquera, Victoria
 Ian R. Sissett, Vancouver
 L. Skipp, CCJ, Vancouver
 Society of Organized Services (Pat James), Parksville
 South Peace Community Resources Society, Dawson Creek
 D.S. Souther, Sparwood
 F. Spear, Clearbrook
 James Spears, Vancouver
 George D. Spence, Victoria
 Russell Stanton, Vancouver
 B.D. St. George, Kelowna
 L. Steel, Hope
 Frank L. Stromotich, West Vancouver
 Blair F. Suffredine, QC, Nelson
 Bonnie Sullivan, Nelson
 Surrey Chamber of Commerce (Harold J. Leyenhorst)
 Surrey/White Rock Mediation Services Society, White Rock
 Sidney L. Swanton, Victoria
 Village of Tahsis
 R.M. Tanner, Victoria
 Isabel Taylor, Vancouver
 N. Tide, 100 Mile House
 Rod Todd, Victoria
 Trevor Todd, New Westminster
 D. Trevorrow, Chilliwack
 William M. Trotter, Courtenay
 Carlie Trueman, Prince Rupert
 David Turner, Victoria
 Vancouver Mental Patients' Association
 B. van Oldenborgh, New Westminster
 Frits Verhoeven, Vancouver
 F. David S. Vernon, QC, Maple Ridge
 Jennifer Wade, Vancouver
 Ralph Watts, North Vancouver
 Joel A. Wener, Vancouver
 West Coast Alternatives Society, North Vancouver
 West Coast Environmental Law Association (William J. Andrews), Vancouver
 West Coast L.E.A.F. Association (Susanne Frost), Vancouver
 Westcoast Society for Legal Literacy (Rick Craig), Vancouver
 Western Society for Senior Citizen Services (Morvan Ewan), New Westminster
 Wetmore, CCJ, Vancouver
 D. Whatley, Mission
 Michael Wheatley, Victoria
 M.P. Wilder, Fairmont Hot Springs
 Barry W. Williamson, Coquitlam
 David Wynja Willingdon, Burnaby
 Kip Wilson, Victoria
 John Winder, Kelowna
 Woods Gordon (Jim Taylor), Vancouver
 Megan F. Woodward, Victoria
 Barry Wray, Vancouver
 R. Wren, Surrey
 YWCA (Joyce Statton), Vancouver



BIBLIOGRAPHY

Introduction

- W.Z. Estey, "Who Needs Courts?" (1981) 1 Windsor Yearbook of Access to Justice 263.
- L. Sipes, "A March Against Folly" (1985) 37 Rutgers Law Review 299.

Plain Language

- B. Barr et al., "Legalese and the Myth of Case Precedent" (1985) Michigan Bar Journal 1136.
- M. Blake et al., *Plain Language and the Law: An Inquiry and a Bibliography*, for the Department of Justice, Ottawa (1986).
- R.C. Dick, *Legal Drafting* 2nd ed. (Toronto: Carswell, 1985).
- R.D. Eagleson, "Plain English and Government Communications: The Case for Plain English", presented at a seminar organized by the Department of the Special Minister of State (Australia), Information Co-ordination Branch, in Canberra, 14 June 1983.
- R.D. Eagleson, *Plain English in Government Communications: The Reform of Documents within Government Departments in the United Kingdom* (Department of the Special Minister of State (Australia), Information Co-ordination Branch, 1983).
- G. Hathaway, "The Plain English Movement in the Law - Past, Present and Future" (1985) Michigan Bar Journal 1236.
- Law Reform Commission of Victoria (Australia), *Plain English and the Law* (1987).

Information

- K. Andrus, "Citizen Access to Legal Information", June 1987 Library Journal 38.
- R. Brail, "Unrepresented Litigants: How Are Their Information Needs Being Met?", unpublished study prepared for Legal Services Society, (1988).
- R. Danner, "Public Access to the Law" (1987) 79 Law Library Journal 163.
- G. Dykstra, "Legal Information to the People", from the proceedings of the American Association of Law Libraries, 3 July 1979, 72 Law Library Journal 613.
- G. Dykstra, "How and Why Legal Information Referrals" (1977) 4 Emergency Librarian 14.



Alcohol

- Alcohol in Canada: A National Perspective* (Health and Welfare Canada, 1984).
Field Testing a New Impaired Drivers Course "Planning Ahead" (Alberta Alcohol and Drug Abuse Commission, 1987).
Impact: Program Development Studies (Alberta Alcohol and Drug Abuse Commission, 1988).
Report of the Task Force on Alcohol and Drug Abuse in the Workplace (British Columbia Ministry of Health, Workers' Compensation Board, Business Council of British Columbia, 1987).

The Supreme and County Courts

- C. Baar, "Judicial Independence and the Administration of Courts in Canada" prepared for the National Seminar on Justice: Independence and Accountability, sponsored by the Canadian Institute for the Administration of Justice, in Montreal, 15 October 1987.
 J.W. Horn, *Jurisdiction of the Courts of British Columbia since Confederation*, memorandum written for the Justice Reform Committee (1988).
 L.A. Knafla, ed., *Law and Justice in a New Land: Essays in Western Canadian Legal History* (Toronto: Carswell, 1986).
 N. Lyon, "Modelling as an Approach to Judicial Reform" (1981) 1 Windsor Yearbook of Access to Justice 281.
 J.B. McKinnon, "Local Judges: The Law and Equity Act and the Rules of Court" (1945) 45 Advocate 369.
 New Zealand Law Reform Commission, *The Structure of the Courts* (1987).
 P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987).
 D.R. Verchere, *A Progression of Judges* (Vancouver: University of British Columbia, 1988).
 A. Watts, "The County Court in British Columbia" (1968) 26 Advocate 245.

GOVERNMENT AND OTHER OFFICIAL PUBLICATIONS

- 1986-1987 *Report on the Activities of the Superior Court of Montreal and Its Surrounding and Outlying Districts*, The Honourable Alan B. Gold, C.J.
Civil Justice Review (The English Report), (London: Lord Chancellor's Department, 1988).
Profile of Courts in Canada (Statistics Canada, 1988).
Proposal for Continuing Development and Future Programs, (Ministry of the Attorney General of British Columbia, Justice Development Commission, 1974).
Report of the Ontario Courts Inquiry (The Zuber Report), T.G. Zuber, (Ontario Ministry of the Attorney General, 1987).
White Paper on Courts Administration, (Ontario Ministry of the Attorney General, 1976).

Family Law

- J.W. Horn, "Jurisdiction of the Courts of British Columbia in Family Matters", memorandum written for the Justice Reform Committee (1988).
 D.R. Timms, "Who Are These Family Law Commissioners Anyway, and What Do They Do?" (1984) 5 Advocates' Quarterly 149.



GOVERNMENT PUBLICATIONS

- 1974 Royal Commission on Family and Children's Law (the Berger Commission). *Another Way: Mediation in Divorce and Separation*, (Department of Justice, Ottawa, 1988).
- Family Orders and Agreements Enforcement Assistance* (Department of Justice, Ottawa, 1988).
- Court-Based Divorce Mediation in Four Canadian Cities: An Overview of Research Results*, (Department of Justice, Ottawa, 1988).
- Inventory of Divorce Mediation and Reconciliation Services in Canada* (Department of Justice, Ottawa, 1987).

Criminal Law and Procedure

- T.R.F. Butler and M.Garsia, eds., *Archbold: Pleading, Evidence and Practice in Criminal Cases*, 36th ed., (London: Sweet and Maxwell, 1966).
- S.A. Cohen, *Due Process of Law: The Canadian System of Criminal Justice* (Toronto: Carswell, 1977).
- M. Manning and A.W. Mewett, *Criminal Law*, 2nd. ed., (Toronto, Butterworths, 1985).
- L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750*, vol. 1, (London: Stevens and Sons, 1948).

GOVERNMENT AND OTHER OFFICIAL PUBLICATIONS

- 1986-1987 *Report on the Activities of the Superior Court of Montreal and Its Surrounding and Outlying Districts*, The Honourable Alan B. Gold, C.J.
- Parole: Earning the Privilege, A Discussion Paper on Improving the Parole Process*, Ministry of the Attorney General, B.C., (1988).
- Report of the Ontario Courts Inquiry (The Zuber Report)*, T.G. Zuber, (Ontario Ministry of the Attorney General, 1987).

Management of Civil Cases in the Supreme and County Courts

- J.W. Adler, et al., *Pace of Litigation*, for the Institute for Civil Justice, (Santa Monica: Rand, 1982).
- Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* (Chicago: American Bar Association, 1984).
- W.D. Brazil, "What Lawyers Want from Judges in the Settlement Arena" (1985) 106 Federal Rules Digest 85.
- R. Broomfield and H. Schwartz, "Delay: How Kansas and Phoenix are Making it Disappear" (1984) 23:1 Judges Journal 22.
- Canadian Institute for the Administration of Justice, *Expeditious Justice*, (Toronto: Carswell, 1979).
- P.A. Ebener and M. Selvin, *Managing the Unmanageable*, for the Institute for Civil Justice, (Santa Monica: Rand, 1984).
- R. Fisher, "He Who Pays the Piper" (1985) Harvard Business Review 150.
- H.R. Gage, "How to Reduce the Docket: What One Judge Alone Can Do" (1984) 23:1 Judges Journal 13.
- T.J. Halbert, "The Appointment of Masters in British Columbia", memorandum written for the Justice Reform Committee (1988).



- J.W. Horn, *Report on Fast-Track Procedures in Superior Courts*, memorandum written for the Justice Reform Committee (1988).
- Institute for Civil Justice, *An Overview of the First Seven Years* (Santa Monica: Rand, 1987).
- I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London: Sweet and Maxwell, 1975).
- I.H. Jacob, "The Present Importance of Pleadings" (1960) 13 *Current Legal Problems* 171.
- T.D. Lambros, "Ohio Asbestos Litigation: Case Management Plan and Case Evaluation and Apportionment Process", a case management plan developed by the Court for *In Re Ohio Asbestos Litigation*, (1983).
- A.L. Levin and S.A. Sobel, "Achieving Balance in the Developing Law of Sanctions" (1987) 36 *Catholic University Law Review* 587.
- A. McEachern, "The Statistics of the Vancouver Trial List" (1987) 45 *Advocate* 211.
- A. McEachern, "Observations on Some of the Submissions to the Justice Reform Committee" (1988) 46 *Advocate* 525.
- F.E. McGovern, "Toward a Functional Approach for Managing Complex Litigation" (1986) 53 *University of Chicago Law Review* 440.
- C. Menkel-Meadow, "Judges and Settlement: What Part Should Judges Play?" (1985) 21:10 *Trial* 24.
- C. Menkel-Meadow, "For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference" (1985) 33 *University of California Law Review* 485.
- B.G. Nilsson, "A Litigation Settling Experiment" (1979) 65 *American Bar Association Journal* 1818.
- M.D. Planet, "Reducing Case Delay and the Costs of Civil Litigation" (1985) *Rutgers Law Review* 279.
- S.C. Pointer Jr., et al., eds., *Manual of Complex Litigation*, 2d. ed. (New York: Clark Boardman, 1986).
- M. Pollack, "Discovery - Its Abuse and Correction" (1979) 80 *Federal Rules Digest* 219.
- J. Resnick, "Managerial Judges and Court Delay: The Unproven Assumptions" (1984) 23:1 *Judges Journal* 8.
- J. Resnick, "Managerial Judges" (1982) 96 *Harvard Law Review* 374.
- A. Rogers, "The New Practice and Procedure in the Commercial Division of the Supreme Court of New South Wales", a paper delivered to the Young Lawyers Section of the Law Society of New South Wales, 10 December 1986.
- L.F. Schiller, and J.A. Wall, "Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log" (1982) 6 *American Journal of Trial Advocacy* 27.
- W. Schwarzer, "Sanctions Under the New Federal Rule 11 - A Closer Look" (1985) 104 *Federal Rules Digest* 181.
- D.A. Sipes et al., *On Trial* (Williamsburg: National Center for State Courts, 1988).
- M.F. Southin, "The Forgotten Man" (1982) 40 *Advocate* 221.
- M.F. Southin, "Reflections on Chaos in the Courts" (1983) 41 *Advocate* 641.
- H.R. Smith, "The Concern Over Discovery" (1978) 28 *Drake Law Review* 51.
- S.M. Umin, "Discovery Reform: A New Era or Business as Usual?" (1979) 65 *American Bar Association Journal* 1050.
- E.W. Wright, "Controlling Discovery Abuse: A Microcosm of Procedural Reform" (1987) 66 *Canadian Bar Review* 551.



The Cost of Litigation

- The Defense Trial Lawyers' Task Force on Litigation Cost Containment, *Statement and Report* (Chicago: Defense Research Institute, 1985).
- R. Megarry, "A Free Fantasia of a Visiting Englishman on the Theme of the Cost of Justice", in Canadian Institute for the Administration of Justice, *The Cost of Justice* (Toronto: Carswell, 1980).
- P. Nejelski, "Reducing Litigation Costs and Delay for the Consumer in the United States", in Canadian Institute for the Administration of Justice, *The Cost of Justice* (Toronto: Carswell, 1980).
- M.M. Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1987).
- J.O. Wilson, "The Law and the Profits" (1959) 17 Advocate at 141.

GOVERNMENT PUBLICATIONS

- Report of the Task Force on Public Legal Services (Ministry of the Attorney General, British Columbia, 1984).

Small Claims Court

- P.A. Ebener, "Court Efforts to Reduce Pretrial Delay", for the Institute for Civil Justice, (Santa Monica: Rand, 1981).
- N.L. Epstein, "Reducing Litigation Costs for Small Cases" (1981) 20:2 Judges Journal 9.
- J.T. McDermott, "Equal Justice at Reduced Rates" (1981) 20:2 Judges Journal 16.

Alternate Dispute Resolution

- R.S. Abella and M.L. Rothman, eds., *Justice Beyond Orwell*, for the Canadian Institute for the Administration of Justice (1985).
- Adler, Hensler & Nelson, *Simple Justice: How Litigants Fare in the Pittsburgh Court Arbitration Program*, for the Institute for Civil Justice, (Santa Monica: Rand, 1983).
- Adler, Hensler, & Rest, *Court-Administered Arbitration: An Alternative for Consumer Dispute Resolution*, for the Institute for Civil Justice, (Santa Monica: Rand, 1983).
- American Bar Association Standing Committee on Dispute Resolution, *Dispute Resolution*, Quarterly Information Update (Summer 1987).
- H.W. Arthurs, "Alternatives to the Formal Justice System: Reminiscing About the Future" in Canadian Institute for the Administration of Justice, *The Cost of Justice* (Toronto: Carswell, 1980).
- J.S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1983).
- D.R. Betancourt and P.A. Ebener, *Court-Annexed Arbitration: The National Picture*, for the Institute for Civil Justice, (Santa Monica: Rand, 1985).
- E.A. Cherniak, Q.C., Response to Prof. Arthurs, in Canadian Institute for the Administration of Justice, *The Cost of Justice* (Toronto: Carswell, 1980).
- R. Gibson, "Legal Procedure: Access to Justice: 1883 to 1983" (1984) 9 Dalhousie Law Journal 3.
- D.R. Hensler, "What We Know and Don't Know about Court-Administered Arbitration" (1986) 69 Judicature 270.
- D.R. Hensler and E.S. Rolph, *Court-Ordered Arbitration: The California Experience*, for the Institute for Civil Justice, (Santa Monica: Rand, 1984).



- International Commercial Arbitration Foundation of B.C., *Trustees Report*, First Annual General Meeting, August 31, 1987.
- International Commercial Arbitration Foundation of B.C., *Trustees Report*, Second Annual General Meeting, June 22, 1988.
- F. Klein, ed., *The Improvement of the Administration of Justice: The Judicial Administration Division Handbook*, 6th ed. (Chicago: American Bar Association, 1981).
- T.D. Lambros, "The Summary Jury Trial - an Alternative Method of Resolving Disputes" (1986) 69 *Judicature* 286.
- T.D. Lambros, "Summary Jury Trials" (1986) 13:1 *Litigation* 52.
- D.M. Parker and P.L. Radoff, "The Mini-Hearing: An Alternative to Protracted Litigation of Factually Complex Disputes" (1982) 38 *Business Lawyer* 35.
- A.J. Pirie, "Proposal: Expert-Assisted Negotiation Conferences for Motor Vehicle Claims in British Columbia", memorandum written for the Justice Reform Committee (1988).
- A.J. Pirie, "Dispute Resolution in Canada, Present State, Future Direction", consultation paper for the Law Reform Commission of Canada (1987).
- A.J. Pirie, "The Power and Jurisdiction of the Master on Referral of Cases to Arbitration", memorandum written for the Justice Reform Committee (1988).
- P. Pitsula, *Report on Alternate Dispute Resolution Projects* (unpublished), for the Education and Law Project, Simon Fraser University (1987).
- J. Resnick, "Failing Faith: Adjudicatory Procedure in Decline" (1986) 53 *University of Chicago Law Review* 494.
- E.S. Rolph, *Introducing Court-Annexed Arbitration, A Policymakers's Guide*, for the Institute for Civil Justice, (Santa Monica: Rand, 1984).
- B. Samuels, articulated student, Russell and Dumoulin, "Mediation of Construction Disputes" (unpublished, 1988).
- A. Sarat, "The Litigation Explosion" (1985) 37 *Rutgers Law Review* 319.
- K. Strawczynski, Ministry of the Attorney General of British Columbia, "Re Alternate Dispute Resolution Procedures", memorandum written for the Justice Reform Committee, (1988).
- B.J. Thompson, "Preliminary Thoughts on Alternate Dispute Resolution", memorandum written for the Justice Reform Committee (1988).
- "Lawyers Rate the Arbitration System", editorial, (1979) 9:11 *Construction Claims Monthly* 1.

GOVERNMENT PUBLICATIONS

- Dispute Resolution in Massachusetts*, Final Report of the Governor's Alternative Dispute Resolution Working Group, (1986).

Justice Requirements of Particular Groups

- P.L. Bryden, "Public Interest Intervention in the Courts" (1987) 66 *Canadian Bar Review* 490.
- R.J. Gathercole, "The Cost of Justice: Making the Scales Balance", presented at the Conference on Access to Civil Justice, in Toronto, 20-22 June 1988.
- Ontario Law Reform Commission, *Report on Class Actions*, (1982).
- K.P. Swan, "Intervention and Amicus Curiae Status in Charter Litigation", in Bob Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).



Technology and the Courts

Conference proceedings of the National Conference on Court Technology, sponsored by the National Center for State Courts and its Institute for Court Management, in Denver, April 24-27, 1988.

Statutory Amendments

A.J. Pirie, "Joint and Several Liability", memorandum written for the Justice Reform Committee, (1988).

A.J. Pirie, "Limitation Act Amendments", memorandum written for the Justice Reform Committee, (1988).

House of Lords, *Parliamentary Debates*, 5th ser., vol. 485, col. 1463-1498, "Civil Liability and the Professions" (18 March 1987).

Reports of the Law Reform Commission of British Columbia

Attachment of Debts Act (1978).

Civil Litigation in the Public Interest (1980).

Costs of Successful Unassisted Lay Litigants (1975).

Court Order Interest Act (1987).

Execution Against Land (1978).

Family Property, Study Paper, (1985).

Foreign Money Liabilities (1983).

Settlement Offers (1984).

Shared Liability (1986).